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Condemning A Residential Mortgage Loan: Is It An Extraterritorial Taking?

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CONDEMNING A RESIDENTIAL MORTGAGE LOAN: IS IT AN EXTRATERRITORIAL TAKING?

MICHAEL M. SANDEZ*

Government attempts to solve every problem under the sun are countless. The City of Richmond ("the City"), California's plan to condemn loans held by trustees of residential mortgage-backed securities trusts is one such attempt. The plan would seek to reduce the risk of blight of the kind created by the 2008 financial crisis when housing values decreased and resulted in underwater mortgages that the City believes will increase the incidents of default, foreclosure, and then blight. Richmond has adopted a resolution that declares its legislative intent to pursue a plan with third parties providing counsel and capital for the city. The plan involves condemning a limited number of mortgages, paying a price that is greatly discounted due to what is claimed to be a greater risk of default, restructuring the loans to reduce the principal and improve the terms, and reselling the loans in the secondary mortgage market to other lenders. Unprecedented and without statutory authority, the plan has caught the attention of the legal community. Legal commentary has mainly focused on the constitutional issues raised by the plan. Legitimate questions about public use, just compensation, the impairment of obligation of contract, and interference with interstate commerce are analyzed in the commentary. This Article discusses whether the plan is an extra-territorial taking. California law imposes the stringent requirements of "legal necessity" on a condemnor that targets property located outside its territorial jurisdiction. Since the loans are held by trusts located outside Richmond city limits, this Article concludes that the situs of the

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mortgage loans is the domicile of the creditor, as has been held in cases concerning the analogous governmental power to tax creditors. The creditor's domicile rule provides a check against and accountability for government's excessive use of eminent domain powers. Further, this rule provides a measure of protection for owners of property located outside city limits who are not represented by and cannot vote in elections for the local government.

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INTRODUCTION

Two cities in California and one city in Nevada have considered exercising the power of eminent domain to condemn residential mortgage loans but not the real property that serves as security for the loans. Two cities have rejected the idea,¹ but the City of Richmond (“the City”), California in 2013 passed a resolution with guidelines for the condemnation of approximately 620 residential mortgages.² Due to the unprecedented taking of mortgages after the financial crisis of 2008, these cities have caught the attention of the legal community. Most articles on this topic address several constitutional issues, with public use and just compensation being the two primary issues covered due to the requirements of the Takings Clause of the Fifth Amendment to the U.S. Constitution. This Article, however, primarily focuses on the fact that the residential loan promissory notes are most likely located outside Richmond’s city limits, raising the issue of the taking of extra-territorial property: does a local municipality have the authority to take intangible property such as residential mortgage loans that are located outside its jurisdictional boundary? The context for the taking of mortgages is broader than the 2008 financial crisis. It is fitting, therefore, to briefly consider

1. Jim Christie, *Nevada City Rejects Eminent Domain Plan For Mortgages*, REUTERS (Sept. 5, 2013, 1:28 AM), <http://www.reuters.com/article/2013/09/05/us-northlasvegas-eminentdomain-idUSBRE98406B20130905>; Alejandro Lazo, *San Bernardino County Abandons Eminent Domain Mortgage Plan*, L.A. TIMES (Jan. 24, 2013), <http://articles.latimes.com/2013/jan/24/business/la-fi-mo-eminent-domain-20130124>.

2. Res. No. 120-13, Richmond City Council (Cal. 2013), *available at* http://www.alicelaw.org/uploads/asset/asset_file/1955/2013_Richmond_Resolution_120.pdf.

aspects of U.S. history and eminent domain law.

A. Background

Habitual deficit spending has led government officials of all levels within the United States to use every tactic available to acquire more revenue.³ Civil magistrates threaten and then take private property virtually whenever and wherever they want, seemingly without consequence to their political life. Stand up to them, and watch your world turn upside down, which is often the case even if you win the battle, and certainly is the case if you lose. The courts have nearly neutered the Takings Clause of the Fifth Amendment to the U.S. Constitution by an inordinately high degree of judicial deference and a low degree of judicial scrutiny. Consequently, there is now minimal protection for property owners, notwithstanding the accepted understanding at the formation of the nation that government's central function is to protect its citizens' lives and property, and to do so in the context of a limited and decentralized federal system.⁴ We have come to a far different time than when the emphasis—rhetorically and substantively—was placed on “life, liberty, and the pursuit of happiness.”⁵

The national government of the United States was formed with enumerated powers. The Constitution, in Article I, section 8, delineates the power that the People granted to the newly formed government. The Founders, however, did not explicitly grant a federal power of eminent domain, it being understood as a self-evident matter that a government of enumerated powers needs property to establish itself and to carry out its functions.⁶ The Takings Clause alludes to a power that enables the

3. Maxim Lott, *Report: State Budgets Fudge Numbers to Hide Massive Debt*, FOXNEWS (Nov. 13, 2014), <http://www.foxnews.com/politics/2014/11/13/report-state-budgets-fudge-numbers-projected-debt-worse-than-reported/> (reporting that State Budget Solutions, a think tank that analyzed “unfunded liabilities”, issued a report that found that states under-report their debt, Illinois being the worst and California being another example in that California discloses an unfunded liability of \$4,909 per person, but its actual debt is nearly \$20,000 per person).

4. For the point about a limited national government, see e.g., *Legal Tender Cases*, 79 U.S. 457, 492, 573–74 (1870).

5. THE DECLARATION OF INDEPENDENCE para. 2 (1776).

6. See, William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738 (2013).

At the Founding, the federal government was not understood to have the power to exercise eminent domain inside a state's borders. This understanding was reflected in seventy-five years of subsequent practice and precedent. The federal government sometimes needed land—for roads, lighthouses, etc.—but it did not use eminent domain to get it. Instead, it repeatedly relied on the states to condemn the land it needed. During this period, federal practice, congressional debates, and even two Supreme Court opinions all indicated a

acquisition of property when, as a protective measure, the Clause requires the national government to take private property only for a public use and only when it pays just compensation to the owner.⁷

The People, as the sovereign, must have reasoned that the power of eminent domain can be implicitly extended, since the national government was to be ratified as a limited government with certain identified powers and with the obligation to exercise its express and implicit powers in accordance with the “Laws of Nature and of Nature’s God.”⁸ The Founders understood the laws of nature and of nature’s God to be transcendent principles that, among other things, were to guide government officials and hold them accountable to ensure that the exercise of implicit powers was not inconsistent with the express powers granted in the compact that initially formed the government.⁹ Since the compact

lack of any general federal power of eminent domain.

...

The original view was that the federal government had eminent domain power only in the District of Columbia and the territories, where the Constitution expressly granted it plenary power. Eminent domain could not be inferred from Congress’s enumerated powers or the Necessary and Proper Clause because it was a great power, too important to be left to implication. As mentioned above, this understanding was reflected in uniform, widespread practice. While there certainly were expressions of the contrary view, especially several decades after the Founding, those views were not actually reflected in any judicial holding or federal practice until the Civil War. Meanwhile, during this period the Supreme Court declared—in a surprisingly neglected decision—that outside of the District and the territories “the United States have no constitutional capacity to exercise . . . eminent domain.

Id. at 1741–42 (citations omitted).

Mr. Baude points out that the view of federal eminent domain changed in 1875 when the U.S. Supreme Court decided *Kohl v. United States*, 91 U.S. 367, 372 (1875). *Id.* at 1742–43; *see also*, *Kelo v. City of New London*, 545 U.S. 469, 496 (2005) (O’Connor, J., dissenting).

7. U.S. CONST. amend. V.

8. THE DECLARATION OF INDEPENDENCE para. 1 (1776); *see*, Baude, *supra* note 6, at 1800–01 (making the distinction between implicit powers, which follow from enumerated powers, and inherent powers, which “requires no constitutional recognition”, citing *Kohl v. U.S.*, 91 U.S. 367, 371–72 (1875), in the author’s discussion of the dramatic shift in U.S. Supreme Court eminent domain jurisprudence).

9. The Declaration of Independence referenced a litany of the English monarch’s abuses, which were considered by the Founders as tyrannical and, being such, violated God’s higher law and thus were not law at all. *See* THE DECLARATION OF INDEPENDENCE para. 3, *et seq.* (U.S. 1776) (referencing a litany of the English monarch’s abuses, which were considered tyrannical by the Founders and in violation of God’s higher law). *See generally* Jeffrey C. Tuomala, *Marbury v. Madison and the Foundation of Law*, 4 LIBERTY U.L. REV. 297, 314 (2010) (stating that “. . . if a provision of a constitution conflicts with the law of nature, it is not law, and the courts are not to apply it because it is not law.”).

expressly limits the jurisdiction and authority of the federal government through the delineation of enumerated powers, it follows that its unwritten implicit powers must be limited, as well. It would be illogical to methodically and deliberately form a limited government with the expectation that undeclared implicit powers are unlimited or ever expanding. There is an inextricable relationship between these implicit powers and the government *as it was formed*. The sovereign formed its government to achieve intended purposes and presupposed that such intended purposes would be advanced and reinforced by certain unexpressed implied powers. The power to condemn property is implied because government's very existence as the seat of representative authority must be housed; officials need places to carry out their duties to fulfill government's primary purpose of seeking justice for the protection of lives and property.¹⁰ Beyond this, eminent domain can become a form of tyranny.

Unfortunately, this incredible system, so very different in many respects from what had been attempted in the Old World, has been taken over by elites who believe government knows best. Jurisprudential views that developed over the past century have accepted an ever-expanding view of governmental power.¹¹ As a result, governance, politics, and law have become a suffocating paternalism.¹² A paternalistic approach to nearly all problems by all levels of government is so widespread that now, nearly every turn of the economy justifies some type of official action, including the condemnation of real and personal property. The decision in *Kelo v. City of New London*, a leading U.S. Supreme Court eminent domain case, further entrenches governmental paternalism by a test so broad that it appears that local government will now use the common market cycle as the basis for more central planning.¹³ This is not to say that the City of

10. See, Baude, *supra* note 6, at 1793–94; see also *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1879); *United States v. Jones*, 109 U.S. 513, 518 (1883) (citing *Patterson*, 98 U.S. at 406).

11. See, e.g., Harry G. Hutchinson, *Lochner, Liberty of Contract, And Paternalism: Revising The Revisionists? Review Essay: David N. Mayer, Liberty of Contract: Rediscovering A Lost Constitutional Right*, 47 IND. L. REV. 421, 440, 443–44, 464–65 (2014) for a discussion of sociological jurisprudence and legal positivism as developed in U.S. Supreme Court cases and analyzed in legal commentary.

12. *Id.* at 463.

13. Compare *Kelo v. New London*, 545 U.S. 469, 483 (2005) (declaring that the city was “entitled” to the court’s deference because the city had made the “. . . determination that the area at issue was sufficiently distressed to justify a program of economic rejuvenation[.]”), with *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“When this seemingly absolute protection [of private property in the Fifth Amendment] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the

New London was solely under the pressures of a *common* economic downturn. Apparently, the city was in a bad financial status as a result of decisions that had been made over many years, and certainly was subject to the standard effects of the common economic cycle. The point here is that the *Kelo* ruling declared that public use encompasses economic development and thus provides the basis for a governmental taking of private property, which most likely will be interpreted to justify condemnation in municipalities with far fewer economic problems than those within New London. The problem is that local magistrates are now the arbiters of what is a “sufficiently distressed” area. Exposed to abuse, however, is the private property owner, who owns fee title subject to the whims of local officials’ notions of how to reverse economic distress and to the risks of an economic bust that results from the speculative nature of the local officials’ economic development plan and reliance on private actors that are free to withdraw from the project.

Unfortunately, economic development, supported with plans drawn up by handy experts at the behest of municipal officials, generally will be upheld by the courts¹⁴ where the local government has carefully considered “a comprehensive development plan” and has “complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city’s purposes.”¹⁵ Given the Court’s broad expansion of public use to include economic development, it probably does not matter that the New London plan was a bust;¹⁶ however, it should. One can expect that future economic development plans will pass constitutional muster under the current jurisprudence that extends a great deal of deference so long as it *appears* to be comprehensive, written in a manner that seeks to solve the effects of rough economic waters, and carefully considered in an adequate procedural context, regardless of the speculative nature of the plan.¹⁷ The

Constitution of the United States. The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”) (emphasis added).

14. *Kelo*, 545 U.S. at 484. The *Kelo* majority also recognized that “[p]romoting economic development is a traditional and long-accepted function of government[.]” *Id.* (citing *Berman v. Parker*, 348 U.S. 26, 33 (1954) and other cases).

15. *Id.* at 493 (Kennedy, J., concurring).

16. Jeff Jacoby, *Eminent Disaster, Homeowners in Connecticut Town were Dispossessed for Nothing*, BOS. GLOBE (Mar. 12, 2014, 7:12 PM), <http://www.bostonglobe.com/opinion/2014/03/12/the-devastation-caused-eminent-domain-abuse/yWsy0MNEZ91TM94PYQIh0L/story.html>.

17. For a fairly thorough criticism of the *Kelo* decision that includes discussion of economics, see generally Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183 (2007). Economics is not an exact science in large part because assumptions are made on human subjective decisions and valuation, which will necessarily infuse speculation in any municipality’s economic development plan. See George Steven Swan, *The Law And Economics Of*

lack of a guaranteed commitment by private entities central to the entire enterprise is of no apparent concern.¹⁸

B. *The City of Richmond*

An example of such extensive paternalism is found in the City of Richmond, California, where the city council passed a resolution that sets out its legislative intent and guidelines for the condemnation of approximately 624 mostly performing residential mortgages, so that the city can rewrite and resell the loans to new lenders while those borrowers remain in their homes and receive the windfall of better loan terms with a lower principal.¹⁹ As some City councilmembers acknowledged economic improvement in the City, the Richmond city council majority passed the resolution on the basis that home values are underwater, which the majority believed creates the *probability* that borrowers will default and vacate their homes, lenders will foreclose, and blight will ensue.²⁰ Undaunted by the prospect of significant legal hurdles, the City has not retreated from its resolution. Serious questions regarding public use, just compensation, and impairment of obligation of contract are briefly described in this Article, while the question of the extra-territoriality of the condemnation is more closely considered.

This Article considers the City's plan for mortgage condemnation as an example of the government's excessive use of its power to condemn property. The City must have a fair degree of certainty that the implementation of its regulation would be upheld, as it surveys the predominant jurisprudential landscape that removed property rights from the highly-protected category of fundamental rights and extended a degree

Fiduciary Duty: Womack v. Orchids Paper Products Co. 401(K) Savings Plan, 37 OKLA. CITY U. L. REV. 17, 34–9, 44, 48–49 (2012) (lengthy discussion about the lessons that economists learned and have yet to learn about their discipline after the financial crisis of 2008). Professor Swan commented, “The economist’s knowledge is imperfect because no fully predetermined model adequately represents (by whatever yardstick) the causal mechanism that underpins outcomes at every interval (past, present, and future).” Swan, at 43.

18. *Kelo*, 545 U.S. at 469, 504 (2005) (O’Connor, J., dissenting); see also Somin, *supra* note 17, at 228.

19. See Res. No. 120-13, Richmond City Council (Cal. 2013), available at http://www.alicelaw.org/uploads/asset/asset_file/1955/2013_Richmond_Resolution_120.pdf; see also Joel M. Langdon, *The Importance of a Promise: Underwater Mortgages and a Municipal Rescue Attempt Through Eminent Domain*, 45 URB. LAW. 571, 604–06 (2013) (explaining how mortgagees can remain in their homes if they qualify under certain mortgage reduction programs such as the Home Affordable Modification Program Principal Reduction Alternative).

20. See Res. No. 120-13, Richmond City Council ¶¶ 3–4 (Cal. 2013), available at http://www.alicelaw.org/uploads/asset/asset_file/1955/2013_Richmond_Resolution_120.pdf.

of judicial deference that presumes the validity of regulations notwithstanding their crippling effects upon private property rights and the gross expansion of government. While case law generally supports governmental condemnation of personal property,²¹ there is no case that directly rules on the condemnation of a residential mortgage.²² Before a court rules on this precise question, it is beneficial to review whether local government has the authority to condemn mortgages so that it can restructure and resell them. The literature on the topic typically covers—to one degree or another—the issues raised by the Takings Clause of the Fifth Amendment and the No Impairment of Contract Clause of Section 10 of Article I of the U.S. Constitution.²³ There is less attention given to the extra-territorial nature of the City's condemnation of mortgages that are likely to be located outside City limits.²⁴

C. Local Government's Power to Condemn Personal Property is Limited.

The federal Takings Clause was eventually made applicable to the states and local governments by way of incorporation through the Fourteenth Amendment.²⁵ At the national level, the condemnation of property is considered an implicit power. In contrast, states are granted an express power to condemn property through their constitutions and statutes.

21. Robert Hockett, *Paying Paul and Robbing No One: An Eminent Domain Solution for Underwater Mortgage Debt*, vol. 19 CURRENT ISSUES IN ECON. AND FIN., at 6, nn. 12–14 (2013). Professor Hockett provides citations to several cases wherein the condemnation of various types of personal property was in issue.

22. See, Leanne M. Welds, Note, *Giving Local Municipalities the Power to Affect the National Securities Market: Why the Use of Eminent Domain to Take Mortgages Should be Subject to Greater Regulation*, 79 BROOK. L. REV. 861, 873–74 (2014). Most cases have ruled on issues related to condemnation or dedication of real property and the direct impact on the property interest lenders hold in and through its mortgage or deed of trust; see, e.g., *W. Fertilizer & Cortage Co. v. City of Alliance*, 504 N.W.2d 808 (1993) (dispute between a city's interest in dedicated land and a lender's security interest in the same land).

23. For the Takings Clause, see, e.g., Christine J. De Leon, Note, *Eminent Domain: Richmond, California's Illusory Solution to the Mortgage Crisis*, 40 J. LEGIS. 191, 203–07 (2014); Andrew Peace, Comment, *Coming Up for Air: The Constitutionality of Using Eminent Domain to Condemn Under Water Mortgages*, 54 B.C. L. REV. 2167, 2197–98 (2013). For the Impairment of Contract Clause, see, e.g., Clay A. Counts, Comment, *The Unskinnable Cat: Debt Reduction, Eminent Domain and the Contract Clause*, 33 ST. LOUIS U. PUB. L. REV. 459, 477 (2014); Katharine Roller, Note, *The Constitutionality of Using Eminent Domain to Condemn Underwater Mortgage Loans*, 112 MICH. L. REV. 139, 156 (2013).

24. Michael S. Moskowitz, Comment, *Treading Water: Can Municipal Efforts to Condemn Underwater Mortgages Prevail?*, 41 PEPP. L. REV. 633, 655–56, 665 (2014) (discussing briefly the location of a mortgage and extra-territorial jurisdiction of a municipality to condemn intangible property such as a mortgage and concluding that the City of Richmond would not prevail on this issue).

25. *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 234–36 (1897).

Likewise, local governments and agencies, as political subdivisions of, for example, the state of California, must be granted the express power of eminent domain by the state constitution or a statute before such a power can be exercised.²⁶ Cutting against the presumption of validity of regulations, deference to local municipalities, and minimal protection for economic liberties, are state constitutions and statutes that provide various levels of restrictions to curb local government authority to condemn property.²⁷ One such restriction in California protects against a local government's effort to condemn property located outside its territorial jurisdiction.²⁸ A municipality's extra-territorial jurisdiction for purposes of condemnation is not necessarily coextensive with minimum contacts relative to a court's in personam jurisdiction.²⁹ Relatedly, the lack of extra-territorial jurisdiction to condemn may deprive a California trial court of jurisdiction to try the eminent domain proceeding.³⁰ Yet, the mortgages that are the target of eminent domain do create a lien on real properties that are located within the territorial limits of Richmond. Is this enough to give the municipality the jurisdiction to condemn the promissory notes? The City of Richmond will certainly need to take into account the extra-territorial nature of its taking of mortgage notes in its condemnation plan as it deliberates whether to proceed. Before an examination of the extra-territoriality issue, a description of the Richmond plan to condemn mortgage notes provides a helpful context.

I. DESCRIPTION OF THE CITY OF RICHMOND'S PLAN TO CONDEMN MORTGAGE NOTES

Of the three municipalities that have considered the condemnation of mortgage notes, Richmond remains the sole locale that still might move beyond resolution to actual implementation. San Bernardino County, California and Las Vegas, Nevada have abandoned further consideration. Rather than a broad review of all three proposals, an analysis of the particular aspects of Richmond's plan highlights the deficiencies of the plan and the underlying policy. A recent lawsuit filed in federal court

26. *San Francisco v. Ross*, 279 P.2d 529, 531 (Cal. 1955)..

27. Many states enacted legislation that limits the power of eminent domain in a backlash against the U.S. Supreme Court's holding in *Kelo*. The backlash, however, may have been inadequate to protect against government officials' constant (and perhaps obsessive) use of the power of condemnation. See generally Illya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009).

28. CAL. CIV. PROC. CODE § 1240.050 (West 2015).

29. *Mayor of Balt. v. Balt. Football Club Inc.*, 624 F. Supp. 278, 284–85 (D. Md. 1986).

30. *Harden v. Superior Court*, 234 P.2d 9, 14 (Cal. 1944).

against the City provides a framework for the discussion that follows.

A. The Plan as Described in the Trustees' Recent Lawsuit

The City of Richmond was a defendant in a 2013 lawsuit³¹ for injunctive and declaratory relief from its plan to condemn certain residential mortgages that satisfy criteria established by the City and Mortgage Relief Partners (“MRP”), a for-profit private investment company that consults and actively participates with the City in this endeavor. The lawsuit was filed after the Richmond City Council passed Resolution No. 120-13, which set out in general terms its legislative intent and the guidelines it would follow in its plan to condemn mortgage promissory notes.³²

In a court motion that contains a favorable description of the program, the attorneys for the City and MRP stated that the City may “purchase underwater mortgage loans for their fair market value, using eminent domain powers if necessary, and then reduce the principal balances, keeping the current homeowners in their homes for the benefit of neighborhoods and the City as a whole.”³³ Initially, the City sent letters³⁴ to the holders of approximately 624 mortgages³⁵ in an effort to negotiate the purchase of the mortgages, and the letters informed the lenders that the City might resort to eminent domain if negotiations were fruitless.

The details of the plan indicate why the residential mortgage-backed securities industry has been aggressive in opposing the plan, to the point that a group of trustees³⁶ filed the above-mentioned federal court complaint

31. Complaint for Declaratory and Injunctive Relief, Wells Fargo Bank, Nat’l Ass’n v. Richmond, No. CV-13-3663-CRB at 35 (N.D. Cal. Sept. 16, 2013) [hereinafter Complaint], available at <http://docs.justia.com/cases/federal/district-courts/california/candce/3:2013cv03663/268907/1>.

32. See Res. No. 120-13, Richmond City Council (Cal. 2013), available at http://www.alicelaw.org/uploads/asset/asset_file/1955/2013_Richmond_Resolution_120.pdf.

33. Defendant Richmond’s Notice of Motion and Motion to Dismiss for Lack of Subject Matter Jurisdiction; Memorandum of Points and Authorities in Support Thereof, at 1, Wells Fargo Bank, Nat’l Ass’n v. City of Richmond, No. CV-13-3663-CRB (N.D. Cal. Sept. 16, 2013) [hereinafter Def.’s Motion to Dismiss], available at <http://docs.justia.com/cases/federal/district-courts/california/candce/3:2013cv03663/268907/38>.

34. Defendants’ Opposition To Motion for Preliminary Injunction, at 3, Wells Fargo Bank, Nat’l Ass’n v. Richmond, No. CV-13-3663-CRB (N.D. Cal. Sept. 16, 2013) [hereinafter Def.’s Opp’n to Pl.’s Mot. for Prelim. Inj.], available at <http://docs.justia.com/cases/federal/district-courts/california/candce/3:2013cv03663/268907/32>.

35. City of Richmond City Council Meeting Minutes, at 12 (Dec. 17, 2013) [hereinafter Meeting Minutes], available at <http://www.ci.richmond.ca.us/ArchiveCenter/ViewFile/Item/5649>.

36. The plaintiffs are trustees of hundreds of residential mortgage-backed securitization trusts that hold the mortgages. Trust beneficiaries include public and

against the City and MRP.³⁷ In one court document, the trustees describe the City's plan as follows:

Under the guise of providing "mortgage relief" to Richmond homeowners, Richmond and [Mortgage Relief Partners ("MRP")] intend to use Richmond's eminent domain power to seize mostly performing mortgage loans hand-selected by MRP at steeply discounted prices (typically 80% of the current value of the home, but in many cases much less) and then allow MRP immediately to flip the loan to a new government-backed securitization pool trust for a much higher price (around 95% of the current value of the home). The substantial profit resulting from this eminent domain arbitrage would be shared by MRP, MRP's investors, and Richmond.³⁸

Though the plan may not be implemented precisely as described by the trustees, their description reveals the issues that make the plan controversial and possibly unconstitutional.³⁹

B. *State of the City*

There is good reason to expect that the City will not go forward with the condemnation plan, notwithstanding its successful defense of the federal action. About one year has passed and the City has yet to pass a resolution of necessity. California law requires such a resolution before an eminent domain proceeding may commence.⁴⁰ Contents of the resolution of necessity must include, among other things: (i) a statement of the public use for which the property is to be taken; (ii) the statute that authorizes the condemnation of the property; (iii) a general description of the property and its location; and (iv) a declaration that the public interest and necessity require the proposed project, the proposed project will be compatible with

private pension plans, college savings plans, 401(k) savings plans, insurance companies, mutual funds, university endowments, and government-sponsored enterprises. Complaint, *supra* note 31, at 9.

37. Complaint, *supra* note 31.

38. Plaintiffs' Notice of Motion and Motion for Preliminary Injunction; Memorandum of Points and Authorities in Support Thereof, at i, Wells Fargo Bank, Nat'l Ass'n v. City of Richmond, Cal., No. CV-13-3663-CRB (N.D. Cal. Sept. 16, 2013) [hereinafter Pls' Mot. for Prelim. Inj.], available at <http://docs.justia.com/cases/federal/district-courts/california/candce/3:2013cv03663/268907/8>; but see also Langdon, *supra* note 19, at 590 ("The Plan contemplates that the amount the municipality will pay will be around 85% of the value of the real property that secures the mortgage.").

39. Various commentators have described and analyzed the plan. See, e.g., Langdon, *supra* note 19, at 601; De Leon, *supra* note 23, at 212–218.

40. CAL. CIV. PROC. CODE §§ 1245.220, 1240.040 (West 2015) ("A public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity that meets the requirements of this article.").

the greatest public good, and the property is necessary for the proposed project.⁴¹ Current conditions in Richmond may not satisfy the criteria of a resolution of necessity.

The City's efforts to condemn mortgages appear to have begun in 2013, about five years *after* one of the worst years of the recent financial crisis. In the State of the City Address in January 2014, the Mayor of Richmond lauded the decline in crime and an increase in businesses and jobs in 2013.⁴² At a meeting of the City Council on December 13, 2013 (when Resolution No. 120-13 was passed), an absent councilmember, who wanted to put the plan to a vote of the citizens and who opposed the pending resolution, had his letter read during the meeting. His letter noted that "[m]ost of the current foreclosure loans are no longer owned by the previous so-called Wall Street investors but by various labor unions, credit unions, retirement pension funds and individuals" and that the "value of homes throughout the nation as well as in Richmond are on a continuing sharp increase."⁴³ At the same meeting, a councilmember who was in attendance wanted clarification since the plan "proponents state[d] that of the 624 homes that received notices about one-third of those have had their mortgages successfully renegotiated."⁴⁴ If we assume those 624 homes were selected by the City and MRP because they were in the neighborhoods most impacted by the financial crisis, and that one-third of the loans were indeed renegotiated, the necessity for the exercise of eminent domain appears to be significantly minimized. If there has been a reduction in crime and an increase in business and jobs, it appears the project is unnecessary and does not advance the public good. Evidently, time has made a difference in Richmond, which by these accounts appears to be on its way to recovery.

C. Federal Constitutional Issues Raised by the Richmond Plan

Though the Richmond City Council has not proposed or voted on a resolution of necessity, the Richmond-MRP plan raises fundamental constitutional issues.

1. Public Use

An issue regarding the "public use" nature of the mortgage condemnation plan arises from the fact that the City has selected only

41. See CAL. CIV. PROC. CODE § 1245.230 (West 2015).

42. City of Richmond's State of the City, *Richmond Demonstrates 21st Century Leadership*, (Jan. 28, 2014), available at <http://www.ci.richmond.ca.us/documentcenter/view/28194> (last visited Mar. 13, 2015).

43. Meeting Minutes, *supra* note 35, at 10–11.

44. *Id.* at 11.

certain mortgages to condemn, pursuant to its belief that the resultant metrics will demonstrate economic improvement in the municipality. When approximately 624 mortgages are being considered⁴⁵ in a city with a population of about 106,000 people,⁴⁶ among whom there are presumably thousands of mortgages, the accuracy of the claim that the plan is a “public use” should be called into question.⁴⁷ The plan targets mortgages that for the most part, are performing loans,⁴⁸ which makes it highly probable that the borrowers occupy the houses and presumably maintain their homes in satisfactory condition.⁴⁹ Instead of a public use that benefits the community, the plan is designed to benefit a small percentage of the borrowing population, MRP, and the City itself, the latter two for the sake of profit at the expense of the lenders.⁵⁰ Blight seems to be a distant threat.

Another issue concerns the interpretation of “public use” that now includes economic development. Democratic and Republican administrations at the federal and state levels, as well as “non-partisan” local municipalities, engage in habitual deficit spending for the sake of subsidies or entitlement program creation and expansion, only to strain government budgets on a daily basis.⁵¹ Consequently, a majority of elected officials make revenue generation for government their highest priority, perhaps second only to raising funds for reelection. Nearly every decision turns on economics. With economic survival as a central focus of the day-to-day affairs of local, state, and federal government, economic

45. See *id.*

46. See CITY-DATA.COM, *Richmond, California*, <http://www.city-data.com/city/Richmond-California.html> (last visited Mar. 13, 2015).

47. A challenge to the claim of public use is particularly necessary because the City selected only 624 loans but claimed there were many underwater mortgages, which, in their minds, was the cause for the need to condemn mortgages. See Res. No. 120-13, Richmond City Council ¶ 2 (Cal. 2013), available at http://www.alicelaw.org/uploads/asset/asset_file/1955/2013_Richmond_Resolution_120.pdf (“In addition to this basic standard [of public use], we will specifically restrict the use of eminent domain to the exceptional circumstances when large numbers of households are underwater and there are not other adequate measures to address the problem[.]” (emphasis added)).

48. See Pls’ Mot. for Prelim. Inj., *supra* note 38, at i; see also Langdon, *supra* note 19, at 578.

49. If the homes are not satisfactorily maintained, Richmond code enforcement officers can proceed with cease and desist letters and public nuisance enforcement against the owners-borrowers. See Steve J. Eagle, *Does Blight Really Justify Condemnation?*, 39 URB. LAW. 833, 836, 844–46 (2007) (arguing, among other points, that the alternatives of abatement, foreclosure, and private revitalization are more consistent with the Constitution and produce better outcomes).

50. Langdon, *supra* note 19, at 609–10; see also Alec Harris, Note, *Redemption and Return on Investment: Using Eminent Domain in the Underwater Mortgage Fight*, 8 HARV. L. & POL’Y REV. 437, 452–53, 464 (2014).

51. See Lott, *supra* note 3.

development can easily be made the justification for condemnation of any private property. As long as the procedural steps of thorough study and preparation, a comprehensive written plan, and notice to the public with public hearings are taken, no private owner's property is safe.⁵² Public officials find broad legal authority under the *Kelo* decision, reinforcing their belief that economic development efforts are for the public good, and yet, ignoring the public's passionate reaction against *Kelo* and the implied rejection of eminent domain in certain instances.⁵³ Thus, lawsuits are probably useless because it would be quite difficult to find a pretext for the condemnation. Moreover, a political remedy is practically hopeless.⁵⁴

2. Just Compensation

The deeply discounted prices the City expects to pay for the mortgages indicate there is a potential problem regarding just compensation.⁵⁵ What is the fair market value of a mortgage that is secured by real property with a value that is less than the loan principal balance? The City of Richmond and MRP are of the opinion that deep discounts are justified given the greater risk of borrower default when the collateral property's value is underwater. In their view, borrowers will not continue to make mortgage payments, and, despite investments of down payments and monthly payments (perhaps for years), will walk away when personal financial circumstances indicate that the borrowers will lose their homes by foreclosure. The borrowers lose motivation to stay current and the risk of default increases. Due to the higher risk of default and the cost of foreclosure, there is a decrease in the value of the loan. The City and MRP also claim that the trust beneficiaries are unable to recover the full loan balance through the foreclosure sale, either because values have fallen, or because foreclosure is a remedy that does not typically yield a sales price that provides full recovery for lenders. A steep discount in a mortgage's value is thus justified, according to the City and MRP.

The trustees and beneficiaries, on the other hand, contend that the

52. *Kelo v. New London*, 545 U.S. 469, 503-05 (2005) (O'Connor, J., dissenting).

53. See James W. Ely, Jr., *Post-Kelo Reform: Is the Glass Half Full or Half Empty?*, 17 SUP. CT. ECON. REV. 128 n. 1, 151 n. 109 (2009) (citing legal commentary and news article that discuss public reaction to *Kelo*).

54. See Somin, *supra* note 17, at 218-221.

55. See Peace, *supra* note 23, at 2197-98 (explaining that rather than a traditional approach toward just compensation that is determined by the fair market value of the mortgage as agreed upon by a willing buyer and a willing seller in an arm's length transaction, the plan proponents claim the mortgages are underwater, subject to a higher degree of default, that result in lower foreclosure prices, and should thus be discounted, but that such claims include assumptions that may not occur, such as all mortgages will end in foreclosure, and therefore just compensation may be higher than what the City may want to pay).

underwater value of the collateral has little if any impact on the determination of the fair market value of the mortgage notes because home values are on the rise and lenders can sell the foreclosed properties at a later date when values are even higher. Lenders also contend that the reason why foreclosure sale prices typically do not yield a full recovery of the amount due is because of the lenders' voluntary choice to submit less than full credit bids at the foreclosure sale such that this argument should not be a factor.⁵⁶ Notably, the City and MRP have targeted mostly performing loans, which, of course, indicates that there is a lower risk that the targeted borrowers will default.⁵⁷ This fact alone greatly undermines the City's purported justification for its plan. The City and MRP's position is also weakened because they initially claim that the fair market value of the loans requires a steep discount, yet they turn around to claim the fair market value is higher in order for them to sell the loans (once restructured) at a higher price to new lenders.⁵⁸ In addition, there is a cost to lenders and to residential mortgage-backed securitization trusts when performing mortgages are condemned and thereby removed from the pool, which likely creates an uneven level of risk among the loans that remain within the portfolio.⁵⁹ On balance, it is likely that the actual fair market value will be found to be closer to the principal balances on the loans rather than the deep discounts the City and MRP claims.⁶⁰

3. *Impairment of Obligation of Contract*

Another potential issue is that a political subdivision of a state will impair the obligation of a loan agreement arguably in contravention of the Impairment of Obligation of Contract Clause of the U.S. Constitution.⁶¹ The City's and MRP's plan will use the mechanism of eminent domain for the purpose of actually rewriting the terms of certain mortgages, which provides a windfall to borrowers, a loss to trust beneficiaries, and a handsome profit to the City and MRP, its investment partner. Neither the

56. There are many reasons, legal and factual, why a lender submits less than full credit bids at a foreclosure sale, but this article does not delve in to this topic.

57. See Langdon, *supra* note 19, at 598.

58. The City and MRP will likely claim that the value would rise because the loan terms were changed to make it easier for the borrowers to make their payments and avoid default. There may be a difference in loan terms, but there does not appear to be a difference in the risk of default because borrowers already make their payments under current loan terms. Also, this ignores the indirect beneficial impact that the apparent upward trend of home values and the economy in general in Richmond have on the value of extant mortgages.

59. See Langdon, *supra* note 19, at 599.

60. See *id.* at 599–600.

61. U.S. CONST. art. I, § 10, cl. 1; see also Roller, *supra* note 23, at 156; Counts, *supra* note 23, at 477.

technical procedures nor the substance of eminent domain law should overshadow the reality that the plan would impair the obligation of contract between borrower and lender.⁶² According to the trustees, the plan may put the trusts, the trustees, and/or the beneficiaries in jeopardy of violating federal tax law.⁶³ Query whether the trustees would be at risk for or have a defense against claims of breach of the residential mortgage-backed securitization trust pool agreements or breach of fiduciary duties owed to the remaining pool beneficiaries because of the nonconsensual nature of the condemnation of certain mortgage loans, the condemnor's subsequent modification of the loan terms, and its resale of the newly restructured loans with better terms.

D. Status of the Trustees' Lawsuit Against the City of Richmond and MRP

The federal court in *Wells Fargo v. Richmond* did not decide these issues because the trustees' complaint was dismissed for lack of ripeness, since the City of Richmond had not passed a resolution of necessity to start the condemnation proceeding, and the trust beneficiaries had not yet suffered a loss.⁶⁴ Perhaps this and other related articles are solely academic exercises unless and until the City actually commences condemnation proceedings and the parties litigate the issues. Nonetheless, the fact that the City has taken the first step with its resolution of intent and general guidelines for the condemnation of mortgages should alert those who favor greater protection of private property. As the City considers its next step, it is worthwhile to review a local government's power to condemn personal property located outside its territorial boundaries.

II. CURRENT LAW REGARDING THE CONDEMNATION OF MORTGAGES BY EMINENT DOMAIN

An intriguing aspect of the condemnation of mortgages is that the proposal raises many issues. In fact, the range of issues spans the treatment of personal and real property rights by state and federal constitutions, statutes, and cases in the context of government's eminent domain power. In addition, the range of issues is framed by circumstances that have significantly impacted the lending and housing markets, and the economy in general. This Article cannot cover the entire span but does generally

62. See U.S. CONST. art. I, § 10, cl. 1. See Counts, *supra* note 23, at 485; see also Pls' Mot. for Prelim. Inj., *supra* note 38, at 15–16.

63. Pls' Mot. for Prelim. Inj., *supra* note 38, at 4.

64. Order Granting Defendants' Motion to Dismiss and Denying Plaintiffs' Motion for a Preliminary Injunction, at 1–2, *Wells Fargo Bank, Nat'l Ass'n v. Richmond*, No. CV-13-3663-CRB (N.D. Cal. Sept. 16, 2013) available at <http://docs.justia.com/cases/federal/district-courts/california/candce/3:2013cv03663/268907/78> (last visited April 20, 2015).

address the law with regard to some issues and then specifically examines the law regarding the extra-territorial nature of the City's condemnation plan.

A. *Condemnation of Intangible Personal Property*

The City was not the first to develop the plan to condemn by eminent domain certain mortgages that were in private label securitized trusts as a policy strategy for local governments to deal with the effects of the recent financial crisis. MRP may have been the first, but based on the number of articles published on this topic, it appears that much of the credit for this idea goes to Professor Robert Hockett, a Professor of Law at Cornell Law School.⁶⁵ In one of his articles, Professor Hockett states:

Because the law draws no distinctions between kinds of property that can be purchased in eminent domain, it is unsurprising that loans and liens in particular, as one form of contractual obligation among many, are themselves regularly purchased. Among these are mortgage loans and liens, as the Supreme Court and state courts have long recognized.⁶⁶

Professor Hockett cites in his article cases that he contends support local government's power to condemn mortgages.⁶⁷ The cases involve rulings that relate to the condemnation of various types of intangible property.⁶⁸

B. *Condemnation of Mortgages*

The cases cited by Professor Hockett include one case concerning the

65. See Robert Hockett, *Paying Paul and Robbing No One: An Eminent Domain Solution for Underwater Mortgage Debt*, 19 CURRENT ISSUES IN ECON. AND FIN., 1, 9 (2013). A list of his articles is listed under the References section of the article. See Robert Hockett, *It Takes A Village: Municipal Condemnation Proceedings And Public/Private Partnerships For Mortgage Loan Modification, Value Preservation, and Local Economic Recovery*, 18 STAN. J.L. BUS. & FIN. 121, 123–24 nn. 3–6, 11, 126–27 nn. 22, 25, 133–35 nn. 53, 60, 62, 64, 137 n. 68, 157 n. 107 (2012). His articles are further cited therein.

66. Hockett, *supra* note 21, at 6 (footnotes omitted).

67. See *id.* at 6, nn. 12–13.

68. See, e.g., *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 160, 172 (1998) (holding that the interest earned on funds held in a lawyer's trust account ("IOLTA") was the private property of the owner of the principal, *i.e.*, the client, and as such was subject to the Takings Clause of the 5th Amendment of the U.S. Constitution; *Phillips* did not answer the question as to whether the State of Texas statute that required banks to forward the interest earned on IOLTA accounts to the State for distribution to foundations to finance legal services for low-income persons was a taking); *Armstrong v. United States*, 364 U.S. 40, 41, 48 (1960) (a supplier of material to a shipbuilder pursuant to a contract was entitled to the property rights under a materialman's lien created by state law and the federal government's destruction of those property lien rights was held to be a taking of private property that required the payment of just compensation under the Fifth Amendment of the U.S. Constitution); see also *Legal Tender Cases*, 79 U.S. 457 (1870).

dedication of land to a local government for streets and alleys that led to an inverse condemnation action by a lender to protect its property interest created by a mortgage⁶⁹ and another that specifically concerns mortgages in the context of federal bankruptcy legislation.⁷⁰

1. *Municipal Ownership of Dedicated Land*

A lender's inverse condemnation action to protect the priority of its property interest (based on its mortgage lien) over a local government interest in dedicated property does not directly address the outright condemnation of a mortgage by eminent domain.⁷¹ In *Western Fertilizer & Cordage Co. Inc. v. City of Alliance*, developer BRG, Inc. purchased a particular parcel from Western and later the local city approved BRG's plat that contained dedications of certain portions of the parcel to the city for streets, alleys, and public land.⁷² Later, when the balloon payment on the purchase price matured, BRG signed a note and mortgage in favor of seller-Western and the subject parcel became the collateral for the loan.⁷³ After the mortgage loan was created, BRG dedicated more land to the city.⁷⁴ When the developer defaulted, Western filed a complaint for foreclosure and eventually obtained title to the property under a sheriff's deed.⁷⁵ After the city insisted its rights to the dedicated land were superior to that of Western's property rights as a secured lender, Western filed an inverse condemnation action against the city.⁷⁶ Due to competing priority of interests, the discrepancies in the legal description of the collateral property in the mortgage and the legal description of the foreclosed property in the sheriff's deed, the Nebraska Supreme Court reversed the trial court's grant of summary judgment in favor of the city.⁷⁷ The court concluded that a mortgagee does not need to have title or possession of the subject property in order for a governmental taking of a property interest to occur.⁷⁸

Thus, a local government could be required to pay just compensation when it accepts the dedication of land and then asserts an ownership interest in such land that it claims is superior to a lender's mortgage lien

69. *W. Fertilizer & Cordage Co. v. Alliance*, 504 N.W.2d 808, 810–11 (Neb. 1993).

70. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 572–73 (1935).

71. *W. Fertilizer*, 504 N.W.2d at 808.

72. *Id.* at 811.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 819–20.

78. *Id.* at 816, 819.

interest. Such a rule is markedly distinguishable from the locality's initiation of an eminent domain proceeding solely to condemn mortgage promissory notes located outside city limits.

The *Western* case is distinguishable from the City of Richmond plan. *Western* dealt with a municipality's assertion of ownership rights to dedicated land located within that city's territorial jurisdiction and claimed that it had priority over a lender's mortgage security interest in the same land. *Western* did not address a direct, forced taking of mortgage notes held by a lender located outside city limits.

2. Bankruptcy Court Reduction of Mortgage Principal Balance

Federal bankruptcy legislation and related cases have a direct impact on lenders' property interests through bankruptcy courts' authority to strip down or strip off a mortgage from bankrupt debtors' real property under certain circumstances.⁷⁹ In *Louisville Joint Stock Land Bank v. Radford*,⁸⁰ the U.S. Supreme Court struck down the Depression-era Frazier-Lemke Act (an amendment to the Bankruptcy Act)⁸¹ after the debtor's lender successfully intervened in the bankruptcy case to assert a constitutional challenge against the Act under the Takings Clause of the Fifth Amendment to the U.S. Constitution. The Court concluded that:

[since] the act as applied has [taken a property interest from the bank without compensation], we must hold it void; for the Fifth Amendment commands that, however great the nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.⁸²

The Court recognized that the Act had the purpose "to preserve to the

79. This Article does not analyze the circumstances under which bankruptcy courts can or cannot strip down or strip off mortgages from the collateral real property. This topic remains an issue, as the U.S. Supreme Court on November 17, 2014 granted a writ of certiorari and on March 24, 2015 heard oral argument in the consolidated cases of *Bank of America v. Caulkett*, No. 13-1421, 2014 WL 2207208 (U.S. Nov. 17, 2014) and *Bank of America v. Toledo-Cardona*, No. 14-163, 2014 WL 3965212 (U.S. Nov. 17, 2014) to address the question: Does Section 506(d) of the Bankruptcy Code permit a chapter 7 debtor to "strip off" a junior mortgage lien in its entirety when the outstanding debt owed to a senior lienholder exceeds the current value of the collateral? See *Caulkett*, 2014 WL2207208, at *3 (outlining the question presented); *Toledo-Cardona*, 2014 WL3965212, at *3.

80. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

81. See *id.* at 572-73.

82. *Id.* at 601-02.

mortgagor the ownership and enjoyment of the farm property” and had an “avowed object . . . to take from the mortgagee rights in the specific property held as security . . . and . . . ‘to scale down the indebtedness’ to the present value of the property.”⁸³ To achieve these goals, the Act worked to take property rights from the bank.⁸⁴ In light of the substantive limitations on the character of the bank’s mortgage that the Act imposed, the Court stated, “[i]f a part of the mortgaged property were taken by eminent domain, a mortgagee would receive payment on a similar basis.”⁸⁵ Thus, the *Radford* Court recognized that if the underlying land were taken, the mortgagee’s property interest would be impacted, as well, entitling it to compensation just as the landowner would receive payment.⁸⁶ As a result, *Radford* concluded that a bankruptcy law that significantly alters a mortgage lien such that essential property rights are all but destroyed is invalid.⁸⁷

Inasmuch as the *Radford* opinion strongly defended private property rights, it is no wonder that the ruling has been criticized⁸⁸ and

83. *Id.* at 594 (emphasis added).

84. *Id.* at 594–95 (“As here applied it has taken from the Bank the following property rights recognized by the Law of Kentucky: (1) The right to retain the lien until the indebtedness thereby secured is paid. (2) The right to realize upon the security by a judicial public sale. (3) The right to determine when such sale shall be held, subject only to the discretion of the court. (4) The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself. (5) The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.”).

85. *Id.* at 596 (referencing the taking of real property and not the mortgage itself as personal property).

86. However, in a condemnation proceeding when a municipality takes land with interests held by a fee owner-borrower and by a mortgage lender, there is an apportionment of the compensation paid. In California where there are divided interests in the property (e.g., the fee owner and a trust deed beneficiary), the condemnor in an eminent domain proceeding can require the trier of fact to determine the compensation to be paid to all defendants, who then can produce evidence as to their respective interests and right to all or a portion of the compensation, which the trier of fact shall apportion according to proof. CAL. CIV. PROC. CODE § 1260.220 (West 2015).

87. *Radford*, 295 U.S. at 601–602. The *Radford* court did not address the possible result if Congress had set out a mechanism within the Act to provide lenders with just compensation when debtors were granted mortgage relief under the Act.

88. In re *Yi*, 219 B.R. 394, 401 (E.D. Va. 1998) (“[L]ien avoidance under the federal bankruptcy power ‘does not come within the traditional definitions of takings under the Fifth Amendment.’” (Citation omitted)); In re *A.V.B.I., Inc.*, 143 B.R. 738, 746 (Bankr. C.D. Cal. 1992); *Pillow v. Avco Fin. Servs.*, 8 B.R. 404, 411 (Bankr. D. Utah 1981). *Radford*, a 1935 case, was decided just prior to the U.S. Supreme Court’s remarkable shift in the 1930s and 1940s toward greater deference to government and

distinguished.⁸⁹ Nevertheless, it remains viable and it has been relied upon in more recent opinions.⁹⁰ *Radford* provides a cautionary flag in that it acknowledges that private property rights ought to be protected when government asserts its enumerated bankruptcy power.⁹¹ The line of cases that follow *Radford* hold to the principle that the Fifth Amendment's Takings Clause protects lenders' private property interests notwithstanding the bankruptcy setting.

The courts that criticize *Radford* conclude that the Takings Clause does not impede the authority of bankruptcy courts, though the secured mortgage and the related property interest may be directly affected by court orders. Such courts place an emphasis on the policy that Congress intended the bankruptcy statutes to grant relief so that debtors have a fresh start, and further reason that to achieve the policy goal, such statutes cannot be made vulnerable to a takings claim.⁹² Though the treatment of debtors under the law has a checkered past, there is a longstanding regard for the principle that debtors often need to be unburdened by oppressive debt that goes at least as far back as the Old Testament in the Bible.⁹³ Since bankruptcy

away from earlier closer scrutiny of legislation that impacted private contracts.

89. See *Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke*, 300 U.S. 440, 455-56 (1937); see, e.g., *Kuehner v. Irving Trust Co.*, 299 U.S. 445, 450-53 (1937).

90. See *Rodrock v. Sec. Indus. Bank*, 642 F.2d 1193, 1197-98 (10th Cir. 1981) ("Counsel suggests that, with the passage of time, *Radford* has lost its steam and that later decisions of the Supreme Court cast doubt on the continuing vitality of that decision. We disagree. Such cases . . . may well refine the rule of *Radford*, but they do not destroy the fundamental teaching of *Radford* that Congress may not under the bankruptcy power completely take for the benefit of a debtor rights in specific property previously acquired by a creditor." Footnote 5 in *Rodrock* states, "We note that, not only has *Radford* never been overruled, either expressly or impliedly, but it has continued to be cited by the Supreme Court. *Rodrock*, 642 F.2d at 1197 n.5 (citing *Armstrong v. United States*, 364 U.S. 40, 44 (1960)); see also, *In re A.V.B.I., Inc.*, 143 B.R. at 746 (citing *United States v. Security Indus. Bank*, 459 U.S. 70, 74 (1982) to acknowledge the U.S. Supreme Court's reliance on *Radford* "for the proposition that there are Fifth Amendment limitations on the extent to which the bankruptcy statutes can 'be used to defeat traditional property interests,' like lien rights").

91. See U.S. CONST. art. I, § 8, cl. 4.

92. See, e.g., *In re Pillow*, 8 B.R. 404, 411, 420 (Bankr. D. Utah 1981) ("Furthermore, Congress recognized that 'one of the primary purposes of the bankruptcy act is to 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.' This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution that property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" (citing *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (emphasis and citations omitted)).

93. *Deuteronomy* 15:1-11.

mortgage relief is a direct challenge to a lender's property interests (by "stripping down" or "stripping off" the mortgage lien from the debtor's real property), the significance of the clash between the policy to give debtors a fresh start and the protection of private personal property interests cannot be underestimated. Bankruptcy courts have worked through the reasoning to balance these two competing interests, but this Article does not describe the dividing line in the bankruptcy context. Instead, this Article briefly examines the City's plan in light of the fresh start policy.

Both the bankruptcy statutes and the City's plan have the potential to directly deprive a lender of its personal property interest. Since there is a dearth of cases on point, the City will likely distinguish *Radford* and assert the general proposition that it can condemn mortgage notes outright, an act roughly analogous to the stripping off of the mortgage balance and lien. Accordingly, it is of value to examine the City's plan in light of the bankruptcy courts' fresh start policy. Bankruptcy courts rely on federal legislation based on a constitutionally enumerated power and the policy of a debtor's fresh start to enable a debtor to request a court to grant mortgage debt relief in the form of stripping down or stripping the loan principal. The City's plan, if implemented, would condemn mortgage notes without enabling legislation in order to directly force the lender, without its consent, to relinquish the entirety of its personal property interest through an eminent domain sale. What fresh start does the City and MRP provide for the borrower and for the City? After immediate protection pursuant to the bankruptcy court's automatic stay, a debtor-borrower can seek court approval of a loan repayment plan—the debtor enjoys a fresh start as he regains his financial footing over time and eventually the lender is made whole. The City's plan, however, does not require anything from the borrower and fails to make the lender whole. In fact, the lender's position is worse as it would be forced to sell at what appears to be below market price. Also, the City's form of a "fresh start" is actually a windfall because the borrower is given a new mortgage with a reduced loan principal and with better terms.⁹⁴ The borrower would clearly be in a much better position as a result of the strong-arm tactic of eminent domain that forces his lender to suffer a loss.

A bankruptcy court judge and an appointed bankruptcy trustee evaluate the details of a debtor's income, expenses, and debts before the decision to grant a fresh start is made. The City, on the other hand, has not made and most likely will not make an evaluation of a borrower's general financial circumstances or of the specific mortgage. The City simply has taken

94. See Res. No. 120-13, Richmond City Council ¶ 6 (Cal. 2013), available at http://www.alicelaw.org/uploads/asset/asset_file/1955/2013_Richmond_Resolution_120.pdf

MRP's recommendation on which mortgages to condemn. The City and MRP primarily select borrowers who are current with their loan payments, unlike bankruptcy courts that have discharged the debts or equitably divided among creditors the assets of borrowers overwhelmed with debt. Under the City's and MRP's plan, approximately 624 mortgagors would receive a better loan, giving the term "relief" a new meaning. Moreover, there does not appear to be a current thought to provide a "fresh start" to the multitude of other borrowers who live within city limits.

Further, the City would not experience a fresh start. The restructuring of 624 targeted mortgages is too few to make a significant difference and it would be speculative to claim that blight conditions would be reduced (even if detectable). Even if defaults and foreclosures were to actually exist in such numbers as to pose a real threat, it would be far better to contain such a threat through public nuisance and other ordinances,⁹⁵ as well as background principles of state property law,⁹⁶ rather than to push the public use requirement into practical extinction.⁹⁷ Although the purchase and resale of mortgages may provide profits for the City and MRP, it is unlikely that the City's financial condition would be relieved of the pressure of long-term debts, subsidies, and entitlement programs.⁹⁸ As

95. See e.g., RICHMOND MUN. CODE §§ 9.22.010-140 (2014); see also Eagle, *supra* note 49, at 836.

96. Lucas v. S.C. Coastal Comm'n., 505 U.S. 1003, 1027-28 (1992).

97. See Kelo v. New London, 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting) (warning that the public use requirement may cease to exist after this decision); see also Steven J. Eagle, *A Resurgent "Public Use" Clause Is Consistent With Fairness*, 19 APR. PROB. & PROP. 18, 19 (2005) (a pre-Kelo article that draws attention to local government's use of condemnation as a "marketing tool" to draw business and to judicial conflation of "public use" and "public purpose." Further, the article comments on the then recent decision in County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004), to say, "[a]lthough the Hathcock approach is hardly perfect, it does illustrate that only in rare instances does a town's economic survival depend on condemnation of a few specific parcels for resale").

98. Generally, recent history has shown that governmental officials at all levels have increased the number of programs and their budgets, and rarely if ever have terminated a program. This practice, as recounted on the daily news, has led the federal government and many state and local governments to accumulate a significant and perhaps irreversible amount of debt. In fact, municipal bankruptcies are apt to be more common in recent times, like that of the filing by the City of Detroit, Michigan. See Matt Helms, Nancy Kaffer & Stephen Henderson, *Detroit Files For Bankruptcy, Setting Off Battles With Creditors, Pensions, Unions*, DETROIT FREE PRESS (Jul. 19, 2013, 7:47 AM), <http://www.freep.com/article/20130718/NEWS01/307180107/Detroit-bankruptcy-filing-Kevyn-Orr-emergency-manager>. For an article regarding Detroit and other large cities with financial trouble, see generally Todd Spangler, *Detroit Not Alone Under Mountain Of Long-Term Debt*, DETROIT FREE PRESS (Jul. 22, 2013, 3:21 PM), <http://www.freep.com/article/20130721/NEWS06/307210073/detroit-bankruptcy-pension-benefits-unfunded-liability>.

a result, Richmond citizens would not see a fresh start but rather, would probably face higher taxes or a reduction in fundamental services so that officials' preferred programs are created, maintained, or expanded.⁹⁹

Thus, a city council that puts itself in the lending business or in the secondary mortgage market does not create a fresh start. If the plan merely called upon the City to condemn existing loans and to serve as a one-time "broker" that sells the restructured loans, there would still not be a fresh start for the larger community, and consequently no public use. Whether as a long-term participant or a one-time broker in the private mortgage market, the City abrogates its fundamental role of protecting lives and property.

Let us suppose there is indeed a fresh start for the few as a result of the plan. The question becomes whether the plan is an excessive exercise of the power to condemn property. It is reasonable to conclude that municipal legislatures have not wisely used the power to condemn property if we were to gauge current practices in light of the historical understanding of eminent domain, the emphasis on paternalism, and the more frequent use of central economic planning. As a token gesture in recognition of James Madison's comment that if angels were to govern men there would be no need for internal or external controls of government,¹⁰⁰ state legislatures throughout the country have promulgated statutory measures to protect against municipal overreach through the taking of property.¹⁰¹

III. EXTRA-TERRITORIAL CONDEMNATION OF MORTGAGE NOTES

California, like many other states, uses its constitution¹⁰² and legislation¹⁰³ to authorize its political subdivisions to condemn property

99. The author calls upon himself and his readers to be realistic about the methods of governance practiced by elected officials and bureaucrats. More importantly, the author and his readers must face the consequences of re-electing officials who continue current practices, and must bring about a robust revival of the political remedy of elections.

100. THE FEDERALIST No. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003).

101. The men (or women) who are in office or serve as government employees make mere token gestures to be restrained under a system of checks and balances because, in the author's opinion, these same public servants appear to be in the constant pursuit of ways to circumvent the very statutory protective measures they draft and enact. To be fair, it is important to recall that it is often the judiciary's deference to legislative action and minimal scrutiny of regulation that impacts fundamental property rights that enable the circumvention.

102. CAL. CONST. art. I, § 19(a) ("Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.").

103. CAL. CIV. PROC. CODE CIV. P. § 1230.020 (2015) ("Except as otherwise specifically provided by statute, the power of eminent domain may be exercised only as provided in this title."); see CAL. CIV. PROC. CODE § 1240.030 ("property" for a

through eminent domain. Without enabling law, local government cannot freely act to take property.¹⁰⁴ With enabling law, local municipalities can initiate eminent domain proceedings, but there are limits imposed on the power.¹⁰⁵ Most relevant to the City's plan is the statutory provision that concerns the location of the property to be taken. Generally, a local government or agency lacks the power to take property that is outside its territorial jurisdiction unless there is a specific statute that authorizes the taking¹⁰⁶ "or [the power is] necessarily implied as an incident of one of its other statutory powers."¹⁰⁷ Rather than review the issues of public use, just compensation, and impairment of contract raised by the Richmond plan, this Article takes a closer look at the California law that concerns extra-territorial condemnation.

A. *The California Constitution and the Power of Eminent Domain*

The California Constitution expressly prohibits state and local government from acquiring through eminent domain an owner-occupied residence so that it can transfer it to a private person.¹⁰⁸ This prohibition does not apply, however, if state or local government condemns property "for the purpose of protecting public health and safety; preventing serious, repeated, criminal activity; responding to an emergency; remedying environmental contamination that poses a threat to public health and safety[;]"¹⁰⁹ or "acquiring private property for a public work or improvement."¹¹⁰ Thus, there is no express constitutional authority to condemn: i) a residential real estate loan promissory note; ii) an owner-occupied residence in order to transfer it to a private person; or, iii) property for economic revitalization. Unless the condemnation, restructuring, and reselling of a residential mortgage loan is construed to fall within one of the stated purposes, the City of Richmond must look for

"proposed project"); CAL. PUB. RES. CODE § 5540 (2015) (real or personal property for exercise of powers by a regional park and other districts for such things as an open-space easement); CAL. GOV'T. CODE § 37353 (2015) (real property for parking and streets). See generally *Harden v. Superior Court*, 284 P.2d 9, 14–15 (Cal. 1955).

104. *San Francisco v. Ross*, 279 P.2d 529, 530–31 (Cal. 1955); see also CAL. CIV. PROC. CODE § 1230.020 (2015).

105. *Ross*, 279 P.2d at 531; see also CAL. CIV. PROC. CODE § 1230.020 (2015). Post *Kelo* cases outside of California have reinforced the point that under state law there are limits placed on the power of eminent domain. See, e.g., *Bd. of County Comm'rs v. Lowery*, 136 P.3d 639, 646 (Okla. 2006) (citing *Kelo*, (O'Connor, J., dissenting)).

106. CAL. CIV. PROC. CODE CIV. P. § 1240.050 (West 2015).

107. *Id.*

108. CAL. CONST. art. I, § 19(b).

109. CAL. CONST. art. I, § 19(c).

110. CAL. CONST. art. I, § 19(d).

legal authority in a state statute.

B. California Statutes and the Power of Eminent Domain

California's eminent domain law establishes the procedures for eminent domain proceedings.¹¹¹ "A city may acquire by eminent domain any property necessary to carry out any of its powers or functions."¹¹² The extent of city powers or functions must be determined of course. Whether a city actually condemns property by eminent domain is a decision that is left to the city official's discretion.¹¹³ The breadth of statutory condemnation authority expands to enable a city to acquire personal or real property located within *or beyond city limits*, and to convey such property, as well: "The legislative body may *purchase*, lease, exchange, or receive such personal property and real estate situated inside or *outside the city limits* as is necessary or proper for municipal purposes. It may control, dispose of, and convey such property for the benefit of the city."¹¹⁴ An acquisition of a residential mortgage promissory note possessed outside of Richmond city limits must be shown by the City to be "necessary or proper for municipal purposes."¹¹⁵ It has yet to be shown in California case law that a locality's condemnation of residential mortgage promissory notes is a municipal purpose, much less a necessary or proper one. Standard definitions of local government purposes do not involve the public entity's participation in the secondary mortgage market by condemning a mortgage loan in order to restructure the original loan terms and then selling the new loan.¹¹⁶

California Code of Civil Procedure Section 1240.050 declares that a local *public entity*¹¹⁷ can acquire property only within its territorial limits,

111. CAL. CIV. PROC. CODE CIV. P. §§ 1230.010 *et seq* (West 2015).

112. CAL. GOV'T CODE § 37350.5 (2015).

113. CAL. CIV. PROC. CODE § 1230.030 (West 2015) ("Nothing in this title requires that the power of eminent domain be exercised to acquire property necessary for public use. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property.").

114. CAL. GOV'T CODE § 37351 (West 2015) (emphasis added).

115. *Id.*

116. The California Supreme Court has taken a strict construction approach to the interpretation of statutes that concern the condemnation of extra-territorial property. *See Harden v. Superior Court*, 284 P.2d 9, 17 (Cal. 1955) (citing *Madera v. Black*, 184 P. 397, 400–01 (Cal. 1919), which stated that "It is the settled law of this state and the general rule everywhere that language purporting to define the powers of a municipal corporation is to be strictly construed, and that any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the [municipal] corporation, and the power is denied") (internal quotation marks omitted).

117. CAL. CIV. PROC. CODE § 1235.190 (West 2015) ("Public entity" is defined to include "the state, a county, city, district, public authority, public agency, and any other

but can exceed its boundary if the entity shows that it has been given the power to condemn by express statutory authority, or if the power is necessarily implied from some other statutorily authorized power.¹¹⁸ Express statutory authority is understandably granted to a public entity to go beyond its territorial limits for the purposes of water, gas, electrical supply, airports, drainage or sewer purposes if there is statutory authorization.¹¹⁹ Such services are commonly understood to fall within core governmental functions because the services are fundamental infrastructure needs of a community.

C. California Case Law and the Condemnation of Extra-Territorial Property

There is a fairly bright line when the state enacts legislation that delineates the governmental purposes for which condemnation of extra-territorial property can be undertaken. Water, gas, electricity, airports, drainage, and sewerage purposes illustrate this point. As for the power to condemn extra-territorial property by eminent domain that is *necessarily implied*, California courts explain when a public entity may effectuate the extra-territorial taking.

1. Court Jurisdiction Over an Eminent Domain Proceeding

Initially, it is essential to point out that the California Supreme Court has held that a trial court does not have jurisdiction to try an eminent domain proceeding if the local municipality lacks extra-territorial jurisdiction to condemn property located outside its boundaries.¹²⁰ In *Harden v. Superior Court*, the Hardens, who owned land outside of the City of Hayward, California in June of 1954, obtained from the County of Alameda a building permit to erect a department store building.¹²¹ In October 1954, the City of Hayward passed a resolution to condemn the Hardens' property, and other land, for the purpose of an off-street parking area.¹²² The City

political subdivision in the state.”).

118. CAL. CIV. PROC. CODE § 1240.050 (West 2015) (“A local public entity may acquire by eminent domain only property within its territorial limits except where the power to acquire by eminent domain property outside its limits is expressly granted by statute or necessarily implied as an incident of one of its other statutory powers.”).

119. CAL. CIV. PROC. CODE § 1240.125 (West 2015) (“Except as otherwise expressly provided by statute and subject to any limitations imposed by statute, a local public entity may acquire property by eminent domain outside its territorial limits for water, gas, or electric supply purposes or for airports, drainage or sewer purposes if it is authorized to acquire property by eminent domain for the purposes for which the property is to be acquired.”).

120. *Harden*, 284 P.2d at 14–15, 17.

121. *Id.* at 11–12.

122. *Id.*

filed a complaint to condemn the land by eminent domain.¹²³ When the Hardens' demurrer was overruled, they filed a writ of prohibition against the trial court.¹²⁴ The California Supreme Court held that the trial court exceeded its jurisdiction when it ruled on the demurrer and issued the writ of prohibition against the lower court.¹²⁵ The court concluded that the writ of prohibition was the appropriate remedy despite the lack of a final judgment, where it appeared that a "failure of justice would occur in a matter of public importance by a wrongful or excessive exercise of jurisdiction" and that the petitioner-landowners "do not have a speedy and adequate remedy by appeal under the circumstances [t]here presented."¹²⁶ The court found there to be a lack of jurisdiction because the City of Hayward did not have the express legal authority to condemn property beyond its boundaries because under precedent case law the term "purchase" in California Government Code Section 37351 must be strictly construed to prohibit extra-territorial condemnation of property.¹²⁷ Put briefly, since the municipality did not have jurisdiction to condemn property outside its boundaries, the trial court did not have jurisdiction to rule on the landowners' demurrer.¹²⁸ Condemning agencies would initiate eminent domain proceedings for naught.

2. *California's Statutory Scheme for the Condemnation of Extra-Territorial Property*

Based on City Resolution No. 120-13, it is fair to assume that the City believes that the metrics of the City's conditions regarding residential housing values, defaults, and foreclosures support a resolution of necessity for the mortgage condemnation plan, and that the plan satisfies the constitutional criteria of public use and just compensation. Nevertheless, its proposed plan cannot get very far since there is no statutory provision in state law that specifically permits the condemnation of residential mortgage loans. A broad provision such as Government Code Section 37351 will not suffice either,¹²⁹ which, pursuant to the holding in *Harden*, would leave a trial court without jurisdiction.

An alternative argument for the City requires it to claim that its power to

123. *Id.*

124. *Id.*

125. *Id.* at 17.

126. *Id.* at 13–14.

127. *Id.* at 16–17.

128. *Id.* at 14 (“[W]hen it is shown that the court, in overruling the demurrer is proceeding without jurisdiction over the subject matter of the action, prohibition may issue.”). See generally, CAL. CODE CIV. PROC. §§ 1102, 1103 (West 2015).

129. See *supra* notes 114 and 127 and accompanying text.

condemn residential mortgage notes is “necessarily implied as an incident of one of its other statutory powers.”¹³⁰ This may prove difficult in that few agree that the handling of transactions in the secondary mortgage market is a local government function.¹³¹ A review of California cases provides an analytical approach to the issue of a necessarily implied power to condemn property.

The opinion in *Kenneth Mebane Ranches v. Superior Court* (hereinafter “*Mebane*”)¹³² provides a good step-by-step analysis of California eminent domain law in the context of a local flood district’s unsuccessful effort to condemn property outside its territorial limits for the purpose of environmental mitigation. Where a specific flood district is given express statutory authority to condemn property outside its boundaries “to construct, maintain, or operate a necessary ‘water’ or ‘drainage’ improvement,” the district, nonetheless, lacks the authority to condemn extra-territorial property for a purpose that is not set out in statutes that generally speak of the power to condemn extra-territorial property.¹³³ “A statutory grant of eminent domain power must be indicated by express terms or by clear implication,” and courts will strictly construe statutory language and resolve reasonable doubts against the municipality.¹³⁴ The court did not find a basis for an extra-territorial taking in the specific flood district regulation’s express language or in a specific statute within California’s eminent domain law.¹³⁵

For the *Mebane* court to find that the flood district did not have express statutory authority for its condemnation effort, it engaged in a thorough analysis as to whether California law grants an implied power to a public agency to condemn property outside its limits. The court analyzed the alternative “necessarily implied” basis for such condemnation in Section 1240.050 of the California Code of Civil Procedure. The court’s train of

130. CAL. CIV. PROC. CODE § 1240.050 (West 2015).

131. Here, secondary mortgage market activity is meant to include the purchase and resale of a residential mortgage loan that already exists, whether a chartered bank, licensed real estate mortgage broker, or a local municipality undertakes the activity.

132. *Kenneth Mebane Ranches v. Superior Court*, 12 Cal. Rptr. 2d 562 (Cal. Ct. App. 1992).

133. *Id.* at 566–67. The flood district in *Kenneth Mebane Ranches* sought to condemn extra-territorial property under its enabling statute in order to conduct environmental mitigation in an improvement within the district.

134. *Id.* at 565–66.

135. *Id.* at 566; *see*, CAL. CIV. PROC. CODE § 1240.125 (West 2015) (“Except as otherwise expressly provided by statute and subject to any limitations imposed by statute, a local public entity may acquire property by eminent domain outside its territorial limits for water, gas, or electric supply purposes or for airports, *drainage* or sewer purposes if it is authorized to acquire property by eminent domain for the purpose for which the property is to be acquired.” (emphasis added)).

thought provides several elements that must be met before such an implied power is found. In *Mebane*, the question was whether the flood district had an implied power to condemn extra-territorial property for the purpose of environmental mitigation. The court said no. The question for the City of Richmond is whether California law enables it to exercise an implied power to condemn residential mortgage loans located outside city limits, since state law does not grant express statutory authority to a public entity to condemn loans regardless of the location.

a. The Standard to Establish an Implied Power to Condemn

The first element that is established under California's statutory scheme and prior case law requires a condemnor to demonstrate a "legal necessity" before it can proceed to take property outside its boundaries. The court in *Mebane* so concluded after it compared the "necessarily implied" phrase in Section 1240.050¹³⁶ and the "necessary for the project" phrase in Section 1240.030.¹³⁷

The provisions in Section 1240.030, the *Mebane* court said, "require only a reasonable necessity under all the circumstances of the case and not an absolute or imperative necessity."¹³⁸ In contrast, Section 1240.050 "involves a jurisdictional issue, a question of law to be determined by the court[.]" and as the court noted, the Legislative Committee Comment stated that Section 1240.050 had codified prior law that had "applied a higher standard than reasonable or practical necessity."¹³⁹ The prior law that established the higher standard included *Carlsbad v. Wight*,¹⁴⁰ which held: "While the record disclosed that the city may have shown practical necessity, *there was no showing of 'urgency, or extreme expediency, or legal necessity, or that the proposed taking [was] indispensable.'*"¹⁴¹ In

136. CAL. CIV. PROC. CODE § 1240.050 (West 2015) ("A local public entity may acquire by eminent domain only property within its territorial limits except where the power to acquire by eminent domain property outside its limits is expressly granted by statute *or necessarily implied as an incident of one of its other statutory powers.*" (emphasis added)).

137. CAL. CIV. PROC. CODE § 1240.030 (West 2015) ("The power of eminent domain may be exercised to acquire property for a proposed project only if all of the following are established: (a) The public interest and necessity require the project. (b) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury. (c) *The property sought to be acquired is necessary for the project.*" (emphasis added)).

138. *Kenneth Mebane Ranches*, 12 Cal. Rptr. 2d at 566–67.

139. *Id.* at 567–68.

140. 34 Cal. Rptr. 820, 825 (Cal. Ct. App. 1963).

141. *Kenneth Mebane Ranches*, 12 Cal. Rptr. 2d at 568 (The Court in *City of Carlsbad v. Wight*, rejected the city's effort to condemn property outside its limits so that it could relocate a storm drainage canal on it.) (emphasis added).

another case, *Los Angeles v. Koyer*,¹⁴² the court stated:

*A grant of the power of eminent domain, which is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice, will never pass by implication, and when the power is granted, the extent to which it may be exercised is limited to the express terms or clear implication of the statute in which the grant is contained.*¹⁴³

As if the quoted prior law had not done so, the court in *Mebane* emphasized the higher standard in Section 1240.050 when it stated:

Because the Legislature intended to codify prior law when it enacted section 1240.050, it must have incorporated the prevailing standard applicable to determine when the power of extraterritorial condemnation will be necessarily implied as an incident to a local public entity's other enumerated powers. That standard requires the power of extraterritorial condemnation to be a matter of "urgency of extreme expediency or necessity," or "manifestly desirable," or "essential to the declared objects" of the local public entity [citations omitted], or indicated by "clear implication" [citation omitted].¹⁴⁴

The court went on to describe the higher standard as "legal necessity."¹⁴⁵ Despite the legislative comments that spoke of a local municipality's demonstration of a reasonable necessity, the *Mebane* court applied the more demanding "legal necessity" standard.¹⁴⁶ Thus, according to this appellate court, a local municipality must demonstrate more than reasonable necessity. As noted in the excerpt above from *Mebane*, to meet the "legal necessity" standard, a local public entity's resolution of necessity must describe the circumstances in which the exercise of the power of an extra-territorial taking is something of an "urgency of extreme expediency or necessity," is "manifestly desirable," is "essential to the declared objects" of the entity, or is "indicated by clear implication."¹⁴⁷ The requirements of a resolution of necessity and related presumptions are set out in California eminent domain law¹⁴⁸ and are discussed below in sub-

142. 192 P. 301, 302-03 (Cal. Ct. App. 1920).

143. *Kenneth Mebane Ranches*, 12 Cal. Rptr. 2d at 568 (The Court in *City of Los Angeles v. Koyer*, reversed a judgment for the city, which sought to construct a public wharf for commerce and to condemn land that was several blocks from the wharf to construct public warehouses for the purpose of operating the wharf) (emphasis added) (internal quotation marks omitted).

144. *Id.* (emphasis added).

145. *Id.* at 567.

146. The *Mebane* court acknowledged that the last paragraph of the Legislative Committee Comment to Section 1240.050 referred to necessity as "only a reasonable necessity". However, the court distinguished the two cases cited in the Comment, and held that "legal necessity" was the appropriate standard. *Id.* at 568-70.

147. *Kenneth Mebane Ranches*, 12 Cal. Rptr. 2d at 568.

148. For the mandate to enact a resolution of necessity, see CAL. CIV. PROC. CODE

part (i).

The *Mebane* court's comments regarding the contrast between Section 1240.050 and Section 1240.030 highlight the critical distinction in views between the City of Richmond and the trustees of the mortgage-backed securities trusts that filed the underlying lawsuit.¹⁴⁹ The opposing views turn on the threshold questions: (1) the location of the residential mortgage loans; and (2) whether location makes the City's plan an extra-territorial taking. Section 1240.030 does not address extra-territorial takings and requires a "reasonable necessity under all the circumstances of the case." This corresponds to the City's position that it does not need specific statutory authorization for a taking of property outside its boundaries since the residential mortgage loans are located within city limits under what it claims to be a "totality-of-the-circumstances test"¹⁵⁰ established by the California Supreme Court in *Oakland v. Oakland Raiders* (hereinafter *Oakland Raiders I*).¹⁵¹ The City also relies on other U.S. Supreme Court and California case law that generally focuses on creditors' and residential mortgage lenders' remedies. The opposing trustees maintain that, pursuant to U.S. Supreme Court and California cases that resolved escheat and taxation issues, the applicable rule is that debts are owned by the creditors and are, thus, located wherever the creditors are domiciled.¹⁵² The trustees also rely on the territorial limitations of Section 1240.050 to further support their position that the mortgage loans have an extra-territorial location.

No case has ruled on where a residential mortgage loan is located for the purpose of determining whether a public entity's exercise of eminent domain power seeks to take extra-territorial property. It is unclear how a California court would rule. The City and MRP rely on the California Supreme Court's factors in *Oakland Raiders I* to posit that the location of intangible property, such as mortgage loans, is within the territorial limits of the condemnor.¹⁵³

Significantly, the California Supreme Court's opinion in *Oakland Raiders I* did not decide the question of the location of the partnership ownership interest in a National Football League franchise team targeted for condemnation. The court identified the City of Oakland as the principal

§§ 1245.220, 1240.040 (West 2015) ("A public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity that meets the requirements of this article."). For the requisite information of a resolution of necessity, see CAL. CIV. PROC. CODE § 1240.030 (West 2015).

149. See *supra* note 29 and accompanying text.

150. Def.'s Opp'n to Pl.'s Mot. for Prelim. Inj., *supra* note 34, at 17–19.

151. 32 Cal. 3d 60 (previously published at 31 Cal. 3d 656) (1982) ("*Oakland Raiders I*").

152. Pls' Mot. for Prelim. Inj., *supra* note 38, at 6–7.

153. Def.'s Opp'n to Pl.'s Mot. for Prelim. Inj., *supra* note 34, at 18–19.

place of business of the partnership, the location of the team's home games, and the location of the team's tangible personal property.¹⁵⁴ The court then stated:

We readily acknowledge that there may be similar or additional factors which would be relevant in determining the appropriate scope of a city's power of condemnation. In fairness, that power must have reasonable limitations. *Prima facie*, however, *such territorial restrictions seem to be satisfied, although we most certainly do not preclude a trial court, on an appropriate factual record, from concluding otherwise.*¹⁵⁵

The court remanded to the trial court because it "[did] not decide whether City has a meritorious condemnation claim in this case. City's ability to prove a valid public use for its proposed action remains untested."¹⁵⁶ The court added that Oakland should have the opportunity to prove its case according to the "established legal principles" and the trial court could render a different conclusion on an adequate record.¹⁵⁷ Interestingly, Chief Justice Byrd concurred in the conclusion but strongly dissented:

The power of eminent domain claimed by the City in this case is not only novel but virtually without limit. This is troubling because the potential for abuse of such a great power is boundless. Although I am forced by the current state of the law to agree with the result reached by the majority, *I have not signed their opinion because it endorses this unprecedented application of eminent domain law without even pausing to consider the ultimate consequences of their expansive decision. It should be noted that research both by the parties and by this court has failed to disclose a single case in which the legal propositions relied on here have been combined to reach a result such as that adopted by the majority.*¹⁵⁸

Chief Justice Byrd had serious concerns about the majority's declaration that "established legal principles" actually were to be applied without precedent for the condemnation of a going concern. Eventually, an appellate court reversed the trial court when it held that Section 1240.050 did not apply to intangible property (as the California Supreme Court had stated) and that the Raiders had not rebutted Oakland's *prima facie* showing that the partnership interest was located in Oakland.¹⁵⁹ This

154. *Oakland Raiders I*, 32 Cal. 3d at 74 (previously published at 31 Cal. 3d at 682).

155. *Oakland Raiders I*, 32 Cal. 3d at 74-75 (emphasis added).

156. *Id.* at 76. The Court reversed the trial court's order that had granted the Raiders' motion for summary judgment.

157. *Id.* at 75, 76.

158. *Id.* at 76-77 (Byrd, C.J., concurring-in-part and dissenting-in-part) (emphasis added).

159. *Oakland v. Superior Court*, 197 Cal. Rptr. 729, 732 (Cal. Ct. App. 1983).

appellate court's holding was consistent with but did not elaborate on the California Supreme Court's discussion of the factors regarding the location of the partnership interest. The scant facts about the partnership location suggest that both the California Supreme Court and the court in *City of Oakland* concentrated on whether the partnership interest was geographically fixed in Oakland city limits, which takes on a minimum contacts form of analysis.¹⁶⁰ Ultimately, the City of Oakland was not able to condemn the partnership interest because it violated the federal Commerce Clause.¹⁶¹

Notably, neither the California Supreme Court in *Oakland Raiders I* nor the *City of Oakland* appellate court explained why Section 1240.050 did not apply to intangible property, though the California Supreme Court did state that intangible property does not have a "permanent situs."¹⁶² Curiously, this suggests that any provision within California's eminent domain law that does not specifically refer to "personal property," "intangible property," or "any property" could not provide authority for a local municipality's condemnation of any species of intangible property. For example, in California Code of Civil Procedure Section 1230.030,¹⁶³ the discretion to condemn "property" that is granted would be limited only to real property. To add to the confusion created by the interpretation of Section 1240.050, the California Supreme Court in *Oakland Raiders I* cited Section 1235.170, which provides the definition of property: "'Property' includes real and personal property and any interest therein."¹⁶⁴ Personal property is commonly understood to include intangible and tangible property. In addition, the California Supreme Court opinion in *Harden*

160. See *supra* note 29 and accompanying text. In *Mayor of Baltimore v. Baltimore Football Club, Inc.*, 624 F. Supp. 278, 284–85 (1986), Baltimore argued that the Colts football team had "sufficient contacts with the state of Maryland" and that since the "Court [could] assert jurisdiction over the team, the City therefore has power to condemn the club." The Baltimore Colts court rejected the City's argument, and turned to the factors that guided the California Supreme Court in the *Oakland Raiders I* case. The Baltimore Colts court noted that the City of Oakland had started its eminent domain action before the Raiders left for Los Angeles, and found that the Colts had abandoned Maryland, had removed its personal property from Maryland, and had informed the NFL of a possible move of its home games which went without response by the NFL.

161. *Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153, 158 (Cal. Ct. App. 1985) ("*Oakland Raiders II*").

162. *Oakland Raiders I*, 32 Cal. 3d at 74.

163. CAL. CIV. PROC. CODE § 1230.030 (West 2015) ("Nothing in this title requires that the power of eminent domain be exercised to acquire property necessary for public use. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property."). See *supra* note 113 and accompanying text.

164. *Oakland Raiders I*, 32 Cal. 3d at 65.

calls for strict construction of provisions in the state's eminent domain law.¹⁶⁵ Under a *Harden* strict construction, the term "property" found in Section 1240.050 ought to include intangible personal property. The muddle created by the Supreme Court in *Oakland Raiders I* contrasts greatly with the methodical and consistent approach taken by the appellate court in *Mebane*.¹⁶⁶ Moreover, the *Oakland Raiders I* case may have involved intangible personal property in the form of a partnership ownership in a NFL franchise, but the lack of clarity on the definition of property and the decision not to apply Section 1240.050 in *Oakland Raiders I* makes the analysis of the *Mebane* opinion the appropriate analytical framework for the extra-territorial location of targeted property issue raised by the City of Richmond's decision to condemn mortgage loans.

The *Oakland Raiders I* and *II* cases present a problem for the City. The secondary mortgage market is an interstate industry, touching investors from all over the country. The secondary mortgage market, particularly the buying and selling of mortgage-backed securities, is subject to federal securities and tax law. The Richmond condemnation plan is thus vulnerable to a challenge based on the Commerce Clause of the U.S. Constitution.

A second problem for the City of Richmond is raised by the *Oakland Raiders I* case because the factors to determine the location of targeted intangible property do not seem applicable to residential mortgage loans. The factors of principal place of business, "home games," and the situs of tangible personal property indicate the necessity of sufficient contacts within the condemnor's territorial boundaries. By way of analogy to the so-called totality-of-the-circumstances analysis, the City and MRP recast the court's factors into six,¹⁶⁷ five of which primarily focus on residential lenders' remedies for defaults of residential mortgage loans in actions that are tied to the collateral real properties in Richmond. This appears to have

165. *Harden v. Superior Court*, 284 P.2d 9, 17 (Cal. 1955); see *supra* notes 116 and 120 and accompanying text.

166. *Kenneth Mebane Ranches v. Superior Court*, 12 Cal.Rptr. 2d 562 (Cal. Ct. App. 1992); see *supra* notes 128 *et seq.*, and accompanying text.

167. Def.'s Opp'n to Pl.'s Mot. for Prelim. Inj., *supra* note 34, at 18-19 (The City and MRP took the factors from the California Supreme Court's opinion in *Oakland Raiders I*, 32 Cal.3d at 74-75 (1982), and recast the factors as follows: "In particular: (1) the debtor is domiciled in the same location as the security (i.e. the home); (2) the loans are secured by real property with a physical location, and the security interest would be condemned with the loan; (3) the security interests are recorded where the property is located; (4) the creditor's remedies are based on the location of the real property; (5) the basis for the public purpose for which the loans would be condemned is assisting residents in the condemnor's jurisdiction; and (6) the information necessary to value the loans concerns the debtor and the security property, not the creditor").

been done in order to obviate the territorial limitation problem. The connection between remedies and land in Richmond is distinguishable from the California Supreme Court's factors that directly relate to essential characteristics of ownership in a partnership entity with direct, physical contacts in the City of Oakland. The place of business, the place of performing the entertainment, and the place of tangible property were all in Oakland. As a matter of critical distinction, the key attributes of the mortgage loan debts are the promissory notes possessed outside of Richmond, the legal and beneficial ownership of said debts that are outside of Richmond, and the borrowers' place of performance, i.e., the place of payment to the lender (or loan servicer or the trustees) at a location most likely outside of Richmond. The security lien on the land follows the debt, which is located at the domicile of the creditor, according to authority cited by the trustees.¹⁶⁸

Though it is not surprising that the City seeks to pin the factors to land inside its boundaries, it ignores the fact that loan agreements are more than remedies. Remedies are but one set of choices made available to lenders in a much broader set of terms in private contracts in which the parties accept a division of rights and duties. Loans give lenders substantive contractual rights, including the right to sue a borrower personally for the intentional waste of collateral property though he is located elsewhere, or to designate the borrower's place of performance (i.e., the place of payment), which could very well be outside of California.¹⁶⁹ Even if these latter types of lawsuits are few, the City's particular emphasis on remedies actually forces a restricted view of the loan agreement and thus should not be dispositive in the determination of the location of the loans.

A sixth factor that the City considers relevant in determining the location of the loans is the public purpose of helping persons within the condemnor's territorial jurisdiction. This adds nothing new to the analysis since the federal and state constitutions require a public use, and state

168. Pls' Motion for Prelim. Inj., *supra* note 38, at 6–7; see CAL. CIV. CODE § 2936 (West 2015). In their opposition, Richmond and MRP partly rely on cases that involved the forfeiture of assets under federal law during the extreme circumstances of war, including a federal law that called for the forfeiture of assets, including credit, held by Confederate enemies during the Civil War. Def.'s Opp'n to Pl.'s Mot. for Prelim. Inj., *supra* note 34, at 19. Forfeiture of enemy assets during times of war is too extraordinary to be an appropriate precedent for the well-established interstate secondary mortgage market during a time of peace.

169. For instance, a lender may decide to sue a borrower who has moved outside of Richmond on the promissory note or for intentional waste of the real property, both of which in certain circumstances can be exceptions to the anti-deficiency protection that borrowers have under California law. For the intentional waste exception, see *generally* *Cornelison v. Kornbluth*, 542 P.2d 981, 990–93 (Cal. 1975); *Nippon Credit Bank v. 1333 North Cal. Blvd.*, 103 Cal. Rptr. 2d 421 (Cal. Ct. App, 2001).

statutes require a taking to be tied to the public entity's purposes. Every public entity will make statements that its project and related condemnation of property outside its district will be for the purpose of assisting citizens who reside within the district; this is the constant refrain of public officials. A great risk exists that these types of self-serving statements will be readily accepted as proof that the extra-territorial taking satisfies the public purpose no matter how tenuous the linkage between the property and the circumstances that create the necessity for the property to be taken to achieve the purpose. As it is now, it is very tenuous whether the circumstances in Richmond create the need to condemn 624 residential mortgage loans, even if located inside Richmond, in order to accomplish a public use. If self-serving statements are accepted as a criterion and taken at face value, then the requirements for the resolution of necessity are made superfluous.¹⁷⁰ Therefore, such self-serving statements should not be a factor in the determination of the location of the targeted property.

Meanwhile, the more persuasive parallel is that of the government's tax claims against creditors with assets such as loans because only government is given the authority to assert the taxing power, and only under limited circumstances.¹⁷¹ Because the power of eminent domain is uniquely given to government, the power to condemn is more akin to the power to tax than it is to the attributes of remedies available to private residential mortgage lenders.¹⁷²

Therefore, California courts ought to consider the location of residential mortgage loans to be the domicile of the lenders, which would require the local municipality to meet the higher standard of showing that there is a legal necessity for its extra-territorial taking, as well as satisfy all other

170. CAL. CIV. PROC. CODE §§ 1245.220, 1240.040 (West 2015) ("A public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity that meets the requirements of this article."). For the requisite information of a resolution of necessity, see CAL. CIV. PROC. CODE § 1240.030 (West 2015). See *supra* note 137 and accompanying text. For the type of presumption created by a resolution of necessity, see CAL. CIV. PROC. CODE §§ 1245.250 (a), (c) (West 2015). See *infra* notes 174, *et seq.* and accompanying text.

171. One commentator argues that the appropriate rule for the location of mortgage loans that are targeted for condemnation is based on government's authority to tax. See Moskowitz, *supra* note 24, at 655–56, 665.

172. In an early California Supreme Court case the distinctions between the powers of taxation and eminent domain were discussed in a dispute where, under the taxing power, assessments were upheld when imposed on street frontage property owners for street improvements. The Court stated: "Indeed, taxation itself, in its ordinary sense, is, perhaps, not the exercise of a distinct, independent sovereign power, but only one form of exercising the right of eminent domain. Yet the terms, the right of taxation, and the right of eminent domain are ordinarily used to express different specific ideas, although both are, doubtless, grounded in the same ultimate sovereign power." *Emery v. S.F. Gas Co.*, 28 Cal. 345, 360 (1865).

requirements imposed on governments that wish to take property from persons to whom they are not accountable.

(i) *Resolution of Necessity and Presumptions*

It is through the resolution of necessity that local legislatures declare the facts that exist in their jurisdiction that they consider to make it legally necessary to exercise the power of eminent domain against extra-territorial property. If the legislature is unable, the owner of the property may challenge the taking, and may be granted a writ of prohibition to stop a trial court from its attempt to exercise jurisdiction over the proceeding.¹⁷³ It is thus appropriate to review the *Mebane* opinion regarding the resolution of necessity.

When there is an attempt to condemn extra-territorial property, the local municipality loses the conclusive presumption it is afforded by the enactment of a resolution of necessity.¹⁷⁴ California Code of Civil Procedure Section 1245.250(a) establishes that the factual circumstances stated in the resolution of necessity are conclusively presumed true when the targeted property is within the locality's territorial limits. On the other hand, if the property is outside city limits the locality's resolution of necessity "merely creates a presumption" under Section 1245.250 (c) that the facts stated therein are true.¹⁷⁵ This change in presumption was another reason, according to the court in *Mebane*, to require the flood district to meet the higher standard of legal necessity when it sought to condemn the targeted extra-territorial property.¹⁷⁶ The *Mebane* court adopted prior case law when it concluded:

Accordingly, we hold that the determination of whether a local public agency's power of extraterritorial condemnation is "necessarily implied as an incident of one of its other enumerated powers" involves a determination of "legal necessity," which has been defined by the courts as a matter of "urgency of extreme expediency or necessity," or "manifestly desirable" or "essential to the declared objects" of the entity [citations omitted], or otherwise indicated by "clear implication" [citation omitted].¹⁷⁷

The stringent legal necessity standard and the elimination of the conclusive presumption are appropriate, for they serve as a check against excessive local government power.

173. *Harden v. Superior Court*, 284 P.2d 9, 17 (Cal. 1955).

174. *Kenneth Mebane Ranches v. Superior Court*, 12 Cal.Rptr. 2d 562, 568–69 (Cal Ct. App. 1992).

175. *Id.*

176. *Id.*

177. *Id.* at 570.

(ii) *Necessity and Considerations of Economy*

Matters of economic efficiency can bear on whether a condemning agency is able to establish the legal necessity to condemn extra-territorial property. A condemning agency may take into account considerations of economy as it evaluates its project and the need to condemn property.¹⁷⁸ In *Sacramento Municipal Utilities Distribution v. Pacific G&E Co.*, the court acknowledged with approval a public utility's consideration of economy for a project where it sought the condemnation of property outside the district's limits in part because it was more efficient to jointly use another entity's utility poles.¹⁷⁹ That court reasoned:

There is substantial evidence to sustain a determination that retention of the facilities in that area is necessary or convenient for service to the inhabitants of the district. While the making of a financial profit alone may not authorize a taking, as cases cited by appellant indicate, it does not follow that considerations of economy and the prevention of excessive expenditures may not be taken into account in determining necessity or convenience.¹⁸⁰

In contrast, the flood district in *Mebane* was not concerned with efficiency when it sought to condemn land outside its district for environmental mitigation purposes. Nor has the City of Richmond taken into consideration matters of economic efficiency in its plan to condemn residential mortgage loans. Instead, Richmond is concerned with underwater mortgages that purportedly will lead to an increase in defaults, foreclosures, and blight.¹⁸¹ Based on the improvement of economic conditions within the City,¹⁸² it appears the City's greater motivation would become profitability if it actually moves forward with its plan. But, profitability alone cannot justify the taking of residential mortgage loans.

(iii) *Necessity and Blight*

Blight can justify the taking of property, though there does not appear to be a statute or a case in California that authorizes the taking of extra-territorial property for the purpose of eliminating blight. Notwithstanding the apparent lack of legal authority and the awareness that the residential mortgage loans are held by trusts located outside city limits, City of Richmond councilpersons rested the justification of mortgage loan takings on the threat of blight. In Resolution No. 120-13, they stated:

178. *Sacramento Mun. Util. Dist. v. Pac. G. & E. Co.*, 165 P.2d 741, 750 (Cal. Dist. Ct. App. 1946).

179. *Id.* at 750-751.

180. *Id.* at 750.

181. *See infra* note 183 and accompanying text.

182. *See supra* notes 42, 43, and 44 and accompanying text.

¶ WHEREAS, home values in Richmond plummeted after the crash and still have a long way to go to recover, with large numbers of Richmond homeowners having “underwater loans” or “negative equity”—where the outstanding principal balance on the home loan exceeds the market value of the house—which *increases the likelihood of further foreclosures, inhibits the ability to refinance, and dampens consumer confidence and economic activity*; and

¶ WHEREAS, in recognition of the severity of this crisis the City of Richmond (“Richmond”) has already begun working to develop the Richmond CARES (Community Acton to Restore Equity & Stability) program in order to help address this crisis; *Richmond CARES being a program that seeks to reduce foreclosures and blight by helping more homeowners get into affordable sustainable mortgages; . . .*¹⁸³

As discussed above,¹⁸⁴ the conditions in Richmond are evidently improving and the City is not in a crisis. There is, however, a difference of opinion within the Richmond City Council and the majority that passed the initial resolution may, in fact, proceed with its plan to condemn mortgage loans. In that event, the City Council must comply with California law relevant to the reduction or elimination of blight.

California law typically addresses the elimination of blight through a local municipality’s redevelopment plan.¹⁸⁵ Local regulations that seek to remove blight are upheld by California courts,¹⁸⁶ which look for the regulation to include a redevelopment plan that will invalidate the regulation if enacted without sufficient evidence that blight exists in the

183. Res. No. 120-13, Richmond City Council ¶ 3-4 (Cal. 2013), *available at* http://www.alicelaw.org/uploads/asset/asset_file/1955/2013_Richmond_Resolution_120.pdf, (emphasis added).

184. *See supra* notes 42, 43, and 44 and accompanying text.

185. In 2012 California law regarding funding for local municipality’s redevelopment agencies changed. In response, the California legislature enacted new legislation, effective January 1, 2014, that empowered local agencies (defined as cities, counties, city and county, and housing authorities) to undertake remediation measures on blighted property (defined as property that is contaminated by the release of hazardous materials) within a blighted area. *Cf.* CAL. HEALTH & SAFETY CODE §§ 25403-25403.8 (West 2014). *See generally* Michael M. Sandez, *Nature Abhors A Vacuum And So Do Local Governments: But Vacant Property Ordinances Go Too Far*, 10 J.L. ECON & POL’Y 345, 365–70, n. 114 (2014) (discussing California legal requirements for the elimination of blight by redevelopment agencies in the context of a local vacant property ordinance that by legislative fiat modified underlying residential mortgage loans secured by real property within the city so that lenders rather than borrowers were obligated to maintain and keep secure homes where lenders had initiated nonjudicial foreclosures because the borrowers had defaulted on their loans and vacated their homes).

186. *E. Bay Mun. Util. Dist. v. Richmond Redevelopment Agency*, 155 Cal. Rptr. 636, 642–43 (Cal Ct. App. 1979) (holding the City properly exercised its police power in removing urban blight).

area of the proposed project.¹⁸⁷ Such evidence is measured by the statutory definitions of blight. Blight involves physical and economic conditions¹⁸⁸ that are so prevalent and substantial that “a serious physical and economic burden on the community”¹⁸⁹ is created. If the administrative record is deficient with regard to substantial evidence of blight, the regulation will be invalidated.¹⁹⁰ These requirements ensure that the regulation is promulgated pursuant to a municipality’s “legitimate governmental function.”¹⁹¹

The City of Richmond faces a stiff challenge should it choose to move forward with a resolution of necessity. Though it is possible that some of the residential loans the City wants to condemn are within its boundaries, the probability is that they are beyond city limits.¹⁹² As such, the City will not have a conclusive presumption that the statements in its resolution of necessity are true, imposing on it the burden of passing a resolution of necessity with substantial empirical data that indeed confirms that the underwater mortgages, defaults, and foreclosures result in blight, which severely impacts the City’s economic standing. Recent statements by Richmond officials say otherwise, however.¹⁹³ Given the state of the City, Richmond officials are unlikely to satisfy the urgency that is required by the higher standard of legal necessity or prove that blight exists.

b. Policies Protective of Representative Government

As a second element derived from the *Mebane* case, policy reasons

187. See, e.g., *Boelts v. Lake Forest*, 25 Cal. Rptr. 3d 164, 178–79 (Cal. Ct. App. 2005) (holding the city’s assertions were conclusory and failed to meet the definition of blight; city unsuccessfully argued there was blight because, among other reasons, a shopping center had antiquated design, 23 commercial vacancies, and signs of deterioration and deferred maintenance; the court pointed out that the city failed to show a connection between the project and health and safety problems, structural defects, or depreciation of property values); *Friends of Mammoth v. Mammoth Lakes Redevelopment Agency*, 98 Cal. Rptr. 2d 334, 359, 365 (Cal. Ct. App. 2000) (insufficient evidence to support the project even though 29% of buildings affected by deterioration and dilapidation); *L.A. v. Glendora Redevelopment Project*, 111 Cal. Rptr. 3d 104, 116–117 (Cal. Ct. App. 2010) (explaining the criteria that must be found for there to be a finding of blight).

188. CAL. HEALTH & SAFETY CODE § 33030(b)(2), § 33031(a) [physical conditions] and (b) [economic conditions] (West 2011).

189. CAL. HEALTH & SAFETY CODE § 33030 (b)(1) (West 2011).

190. *Beach-Courchesne v. Diamond Bar*, 155 Cal. Rptr. 2d 265, 268, 274 (Cal. App. Ct. 2000).

191. *E. Bay Mun. Util. Dist. v. Richmond Redevelopment Agency*, 155 Cal. Rptr. at 642.

192. Moskowitz, *supra* note 24, at 665, nn. 217–218.

193. See *supra*, notes 42, 43, and 44 and accompanying text; Eagle, *supra* note 49, at 833.

further support the “significant limitation [of a mere presumption created by Section 1245.250(c)] on an entity’s exercise of extra territorial condemnation.”¹⁹⁴ An owner of targeted property that is located outside the local entity’s territorial limits is not a citizen who can, through his vote hold officials of the condemnor (or the local legislative body) accountable and is not a local citizen or taxpayer who has the full knowledge to adequately assess the public use project contemplated by the condemning agency.¹⁹⁵ The *Mebane* court put it this way: “But where the property sought to be taken is outside and distant from these territorial limits, neither such knowledge [helpful to the agency officials, citizens, and taxpayers] nor such accountability [of the legislative body and its functionaries] may be present.”¹⁹⁶ Though it would be a fair assumption that the owners of the targeted extra-territorial property and their neighbors would prefer environmentally safe land, the court in *Mebane* was correctly concerned with the use of excessive power by local flood district officials who could take advantage of the affected property owners. Where the eminent domain law did not supply express or legally necessary implied authority, the *Mebane* court did not grant it either.

For the City of Richmond, the risk of minimizing or ignoring the policy concern regarding political representation exists. It must be kept in mind that although the trustees in the recent litigation are major banks and probably have branches within Richmond city limits, the banks filed their claims in their capacity as trustees and on behalf of trusts located outside of Richmond. The trusts are made up of investors from all over the country that include “various labor unions, credit unions, retirement pension funds and individuals.”¹⁹⁷ To help some people in the City, councilmembers want to ignore the people who invest in it through labor unions, credit unions, and retirement pension funds.

Checks and balances, when used within a properly functioning constitutional republic, are effective antidotes to excessive power. Whether the municipality’s concern relates to foreclosures and blight, or to

194. *Kenneth Mebane Ranches v. Superior Court*, 12 Cal.Rptr. 2d 562, 569 (Cal. Ct. App. 1992).

195. *Id.*

196. *Id.* (citing *L.A. v. Keck*, 14 Cal.App.3d 920, 925, 926 (1971)) (“But where the property sought to be taken is outside and distant from these territorial limits, neither such knowledge nor such accountability may be present. Thus, the Legislature has specifically provided that the courts shall pass upon such a taking [citation omitted]. [W]e hold that neither the resolution of the board of a public utility district or the ordinance of the legislative body of a city is prima facie evidence of necessity under Code of Civil Procedure section 1241, subdivision 2, where the property is outside the condemning agency’s territorial limits.” [Section 1241 repealed; subd. 2 replaced by CAL. CIV. PROC. CODE §§ 1240.030, 1240.040, 1245.210 *et seq.*]).

197. See *supra* note 43 and accompanying text.

economic revitalization, the condemnation of extra-territorial property pursuant to an unclear implied power is tantamount to a de facto disenfranchisement of owners of such extra-territorial property. Officials who are wont to exercise power, regardless of whether the law permits it or the data supports it will weaken principles relative to lawful jurisdiction and constitutional representation. Because trust in government is quite low, it is detrimental for local government to reach for property that may be located anywhere in the world¹⁹⁸ and whose owners have no voice, no vote, and no representation.

c. Extension of Implied Authority to Condemn Extra-Territorial Property that is Incidental to a Statutory Mandate

The third element requires a showing that a statute that grants a municipality the express power to take property will also enable an implied power to condemn extra-territorial property if the extra-territorial taking is incidental to the statute's mandates. Section 1240.050 provides an alternative source of authority where "[the power is] necessarily implied as an incident of one of its other statutory powers." There are few cases that have held that the implied power to condemn property outside a public agency's boundaries is valid. The *Mebane* court noted a case in which a city that had the express power to construct sewers also had the power to "extend them beyond its boundaries to an outfall as an *implied incident* of its express powers when necessary or manifestly desirable."¹⁹⁹ Also, it noted another case that held that where a city was authorized by statute to condemn water systems inside its boundaries, condemn wells and water on adjacent lands, and provide water services inside and outside its boundaries, the city also had the implied [] power [to take a water system outside its boundaries] as *incidental* to the existence of the powers expressly granted.²⁰⁰ Land for a sewerage outfall and water systems for the delivery of water services were within the implied authority of condemnation because they were incidental to and accompanied the respective statutory mandates in providing essential infrastructure needs.

In *Mebane*, the issue became whether the mitigation of environmental conditions on extra-territorial land was incidental to the flood district's express regulatory mandate to construct, maintain, or operate all works or improvements inside or outside the district for the purposes of flood control and water conservation. The *Mebane* court was consistent when it

198. Moskowitz, *supra* note 24, at 656.

199. *Kenneth Mebane Ranches*, 12 Cal. Rptr. 2d at 562 (citing *Harden*, 44 Cal.2d at 638–39) (emphasis added).

200. *Id.* at 562–63 (citing *City of N. Sacramento v. Citizens Utilities Co.*, 192 Cal.App.2d 482, 485 (1961)) (emphasis added).

followed the analogy of the water system condemnation case (i.e., *City of N. Sacramento v. Citizens Utilities Co.*) to find the flood district's implied power to condemn property outside its district on the ground that it would be incidental to the district's express statutory purposes of flood control and water conservation.²⁰¹ The analogic reasoning led to the next question: whether environmental mitigation was "legally necessary" to achieve the flood district's statutory purposes. Because the California statutory environmental scheme only required mitigation when feasible and did not grant additional powers to local agencies, the *Mebane* court held that it could not extend an implied power to condemn the extra-territorial land for mitigation purposes as incident to the flood district's statutory purposes of flood control and water conservation.²⁰² Consequently, the court issued a writ of prohibition that ordered the trial court to sustain the demurrer with leave to amend.²⁰³

The City of Richmond has neither an express statutory purpose, nor express constitutional authority, to engage in residential mortgage loan restructuring. As a consequence, it cannot claim that there is an implied power to condemn mortgage loans outside its city limits incidental to some express mandate. Authority to condemn property within its boundaries for the elimination of blight or economic redevelopment may exist, but such authority, to the extent it exists, does not imply the power to condemn intangible property such as mortgage loans outside its city limits.

IV. CHALLENGES FOR THE CITY OF RICHMOND

Notwithstanding the number of favorable articles in support of the plan to condemn residential mortgages, the City has a number of challenges ahead of it if and when it decides to implement the plan. This Article examines the threshold question of the location of the mortgages and the appropriate legal standard for the condemnation of extra-territorial property and the resolution of necessity. The underlying policies that appear to motivate the City are considered as well.

201. *Id.* at 563.

202. *Id.* at 564–65. The California statutory environmental scheme is known as the California Environmental Quality Act, CAL. PUB. RESOURCES CODE, §§ 21000 *et seq* (West 2015).

203. *Kenneth Mebane Ranches*, 12 Cal. Rptr. 2d at 565–66. The Court granted the flood district leave to amend its complaint because the district contended that in an amended complaint it could allege a cause of action for eminent domain because it was required to conduct environmental mitigation as a condition for approval of its project by the relevant public agencies. The *Mebane* Court did not address this flood district's contention or the adequacy of such an allegation in an amended complaint.

A. *The Threshold Question*

The threshold question involves the determination of the location of the residential mortgage loans. The case law that lays out the more persuasive reasoning is that which bases the location of intangible property on where the governmental entity asserts its taxing power against a creditor's assets, including loans. The domicile of the creditor is the location of the loan. The power of eminent domain, like the taxing power, is immense and is given exclusively to the government (or its various agencies). The implied power to condemn property approximates the enumerated power of the government to tax its citizens. In contrast, the City seeks the application of a set of factors that are not analogous to governmental authority but instead focus on a geographic-centric view of lenders' remedies for defaults of residential mortgages. If a court in a case of first impression rules that residential mortgage loans are located in the domicile of the lenders, then the City must demonstrate that there is a "legal necessity" to condemn extra-territorial mortgage loans.

B. *The Standard of Legal Necessity*

According to the *Mebane* court, Richmond would be required to meet the higher standard of a "legal necessity" if it pursues its plan since it seeks to take property that is located outside city limits. California law prior to *Mebane* enunciated a variety of formulations that the *Mebane* court described as "legal necessity." A local municipality must show that the extra-territorial taking is an "urgency of extreme expediency or necessity," is "manifestly desirable," is "essential to the declared objects" of the entity, or is "indicated by clear implication." The facts in Richmond might indicate the effects of an economic downturn, but it does not necessarily follow that blight actually exists or that there is a "legal necessity" to take property located outside its boundaries. Due to the lack of express statutory authority to take property outside its limits, the City will not be able to claim that the taking is "indicated by clear implication" let alone an "urgency of extreme expediency or necessity."

C. *Resolution of Necessity and Presumptions*

The Richmond City Council must enact a resolution of necessity. If in fact a court rules that the mortgage loans are outside of Richmond, the City Council's resolution of necessity will be given a rebuttable presumption that the statements therein are true. However, there are evident signs of economic improvement in Richmond, which undermine its past claim that there is a serious threat of defaults, foreclosures, and blight. The trustees of the mortgage-backed securitized trusts would likely be in a position to rebut the statements in the City's resolution of necessity because the

underlying circumstances in Richmond do not create a legal necessity.

D. Policy

The California legislature has an implicit, if not an explicit, concern for owners of property that are located outside the territorial jurisdiction of the condemning agency. This is indicated by the distinction in Section 1240.050 between property inside and outside an agency's boundaries. Also, the legislature created a difference between conclusive and rebuttable presumptions given to a resolution of necessity, depending on the location of the property. The concern rightly focuses on the property owner as a citizen and taxpayer, and appropriately places limits on the power to condemn property beyond territorial limits. The policy to protect representative government requires the condemnor to act only pursuant to express statutory mandates and to make a greater showing of need before it can take property from those without a vote or representation. The City must recognize that its paternalistic desire to provide assistance to those within its city limits will adversely affect those people who invest in trusts located outside of its city limits.

There are broader policy implications at work. The U.S. Supreme Court has spoken of government's longstanding function of *promoting* economic development.²⁰⁴ But promoting economic development should not mean participating in it. Government repeatedly has proven itself to be grossly inefficient, unsurprisingly incompetent in all but a few tasks such as law enforcement and military (which themselves are incompetent at times), and unjustly prone to cronyism. A significant majority of elected, appointed, and bureaucratic officials take every opportunity to create a bigger, more paternalistic government, regardless of the cost and debt accumulation. It is often said by such officials that for those who have much, much is required,²⁰⁵ as justification to take money and property from those who have it in order to redistribute to those who do not have it.²⁰⁶ Politicians and others who use this biblical reference completely ignore the biblical admonitions regarding stewardship,²⁰⁷ prudence,²⁰⁸ and diligence.²⁰⁹ Those

204. See *supra* note 14 and accompanying reference to *Berman v. Parker*, 348 U.S. 26 (1954).

205. *Luke* 12:48 ("Everyone to whom much was given, of him much will be required, and from him to whom they entrusted much, they will demand the more.").

206. "Man can live and satisfy his wants only by ceaseless labor; by the ceaseless application of his faculties to natural resources. This process is the origin of property. But it is also true that a man may live and satisfy his wants by seizing and consuming the products of the labor of others. *This process is the origin of plunder.*" See FREDERIC BASTIAT, *THE LAW*, 10 (Dean Russell, trans., The Found. for Econ. Educ., Inc. 1993) (1850)) (emphasis added).

207. *Proverbs* 27:23-27.

officials who press for greater government expansion and more redistribution have yet to understand that reliance on the civil magistrate for one's sustenance is not a biblical model,²¹⁰ but instead is a paternalism that is a form of idolatry.²¹¹ They also strive to grow government through economic means that are contrary to the biblical principle that the debtor is the servant of the lender.²¹² Printing money by fiat will not solve the debt problem; nor will it win the war on poverty, as the past fifty years has proven. It is no secret that federal, state, and local governments are overwhelmed by their debt service, which, in turn, imposes greater and greater burdens on taxpayers. To take a phrase used in another context, government's promotion of economic development is not an economic suicide pact, yet that is the road on which we have been put by officials who make short-sighted decisions based on their job retention or a belief that governmental paternalism serves the public good. An overwhelming amount of economic evidence demonstrates that the many forms of wealth redistribution and subsidy programs concocted by the government are ruining the country's economic health.

The financial crisis of 2008 had far-reaching effects, and governments—federal, state, and local—have sought to provide remedies through the promulgation of more regulation and bureaucracy. What government has not done is eliminate the governmental policies and programs that helped create the crisis in the first place.²¹³

E. Implied Power Incidental to Statutory Purpose

According to the analysis by the court in *Mebane*, the City of Richmond

208. *Proverbs* 22:3 ("The prudent sees danger and hides himself, but the simple go on and suffer for it."); *Proverbs* 10:5 ("He who gathers in summer is a prudent son, but he who sleeps in harvest is a son who brings shame.").

209. *Proverbs* 21:5 ("The plans of the diligent lead surely to abundance, but everyone who is hasty comes only to poverty."); *Proverbs* 10:4 ("A slack hand causes poverty, but the hand of the diligent makes rich.").

210. *Proverbs* 27:23-24 ("Be sure you know the condition of your flocks, give careful attention to your herds; for riches do not endure forever, and *a crown is not secure for all generations.*") (italics added); *Psalms* 118:9 ("It is better to take refuge in the LORD than to trust in man. It is better to take refuge in the LORD than to trust in princes."); *Psalms* 146:3-4 ("Put not your trust in princes, in a son of man, in whom there is no salvation. When his breath departs, he returns to the earth; on that very day his plans perish.").

211. HERBERT SCHLOSSBERG, *IDOLS FOR DESTRUCTION* 177-231 (Crossway Books 1993).

212. *Proverbs* 22:7b ("[T]he borrower is the slave of the lender.").

213. See GRETCHEN MORGENSON & JOSHUA ROSNER, *RECKLESS ENDANGERMENT: HOW OUTSIZED AMBITION, GREEN, AND CORRUPTION LED TO ECONOMIC ARMAGEDDON* (Times Books, Henry Holt and Company, LLC, 2011); THOMAS SOWELL, *THE HOUSING BOOM AND BUST* (Basic Books rev. ed. 2010).

will need to first show that it has express authority to condemn intangible property outside its jurisdiction, and if it can do that, it must then show that it has an implied power to condemn mortgage loans as incidental to the cited statutory purpose. As of this writing, there does not appear to be any authority, constitutional or statutory, that enables a local municipality to condemn intangible property, like residential mortgage loans, for the sake of the elimination of blight or economic revitalization. Without express authority, it will not have an implied power to condemn such property. Thus, the City cannot claim that its plan to condemn residential mortgage loans is incidental to a statutory mandate.

CONCLUSION

The open legal question as to whether local government can force itself into the secondary mortgage market through the exercise of its eminent domain powers to condemn residential mortgage loans must be answered in the negative. California courts must prohibit local public entities from the exercise of eminent domain power in this way. Local government does not have the expertise or the resources to engage in such activity. Reliance on third parties for the expertise and capital to pay just compensation for the loans only confirms that the local municipality is beyond its function and purpose. Moreover, participation in the secondary mortgage market takes local government away from the core purposes of protecting life and property.²¹⁴

An exercise of eminent domain powers to condemn residential mortgage loans attempts to fix the consequences of a financial problem that was, to a great extent, created by the government. Assertion of government power in this fashion when market forces already are at work would be a colossal error. Condemnation of residential mortgage loans is unprecedented; it ignores the limits imposed on local municipalities by the constitution, statutes, and case law; it injects an incompetent actor into the secondary mortgage market; and it attempts a fix when there is an insufficient need in the locale. The City of Richmond ought to cease and desist.

214. The argument in favor of the mortgage loan condemnation plan is ironic in that it basically seeks to take property from some so that *others* may keep their property. That those from whom property is taken might be able to afford or recover from the losses that would occur under the plan does not lessen the reality that property has been taken from lender A to give (sell) to lender B.